Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
MONTGOMERY COUNTY MEDIA NETWORK, INC.
d/b/a IMAGISTS
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 17, 1995

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QUESTION PRESENTED

Whether the party aggrieved by the adoption of a change in policy by an administrative agency in the course of an adjudication **must** seek the views of that agency on the question of "retroactive" application of that policy change before petitioning the Court of Appeals to review the "retroactivity" question?

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FEDERAL COMMUNICATIONS COMMISSION,
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Respondents. [1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The decision under review is the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Carmen Matias, et al. v. Federal Communications Commission*, No. 93-1328 (App. 1a) declining to review the decision of that government agency in *Montgomery County Media Network, Inc. d/b/a Imagists*, 8 FCC Rcd. 2763 (App. 3a).

JURISDICTIONAL STATEMENT

The judgment was entered on October 17, 1994 (App. 1a). Rehearing was not sought. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

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[1] The caption reflects all parties to the proceedings in the court below. The petitioner is a joint venture of two individuals.

CONSTITUTION, STATUTES AND REGULATIONS

The constitutional provisions, statutes and regulations involved in this case are: U.S. Const., art. I, §9, cl. 3; U.S. Const., art. I, §10, cl. 1; 29 U.S.C. §160(e); 47 U.S.C. §§309(a), 402(b), 405. Relevant portions of the texts are set forth verbatim in the Appendix at pages 72a-73a.

STATEMENT OF THE CASE

The petitioner, Carmen Matias and Andrew N. Wimbish, Jointly, seeks a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) declining to review a decision of the Federal Communications Commission ("FCC" or "the agency") denying an application of the petitioner for construction permit for a new television station in Conroe (Houston), Texas (App. 3a). Although the petitioner had been the favored choice for grant of the construction permit by the agency's administrative law judge (App. 59a) and review board (App. 30a), under a changed policy announced and applied in the agency decision below, the FCC disqualified the petitioner from consideration for failure to establish good cause for an amendment of its transmitter site proposal (App. 3a).

The former policy in dealing with good cause for acceptance of amendments of transmitter site proposals, financial amendments and other amendments that avoid disqualification (while not improving the comparative posture of the party) was to liberally allow such amendments so as to provide the FCC with a wider group of competing applications to choose from, enhancing the prospect of selecting the application that would most likely result in programming service in the public interest (App. 67a). The changed policy, to apply a strict standard for good cause showings in support of curative amendments, was adopted on the premise that this would shorten comparative proceedings and result in the inauguration of new program service at an earlier date

(App. 67a). Both the former policy and the changed policy were bottomed on the FCC's statutory obligation to grant construction permits for broadcast stations based upon a determination that such a grant would serve "the public interest, convenience and necessity." 47 U.S.C. §309(a) (App. 73a).

The former policy of leniency in dealing with curative amendments in order to widen the choice of applicants was in existence for approximately 30 years dating back to the 1950's. *E.g.*, *Beacon Broadcasting System, Inc.*, 19 Rad.Reg. (P&F) 927 (1959); *Fisher Broadcasting Company*, 30 FCC 177 (1961); *Azalea Corp.*, 31 FCC2d 561, 563 (1971); *Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C.Cir. 1978); *Anax Broadcasting, Inc.*, 87 FCC2d 483, 489 (1981). The first notice that the petitioner had that the leniency policy would be changed to a strict policy was in 1991 when the FCC announced such a policy change regarding financial amendments (App. 61a). The FCC's decision below in 1993 announced the change in policy as it relates to technical amendments (App. 3a). Thus, the petitioner's technical curative amendment was filed (1986) five years before the FCC announced its policy change regarding curative financial amendments (1991) and seven years before the FCC announced its policy change regarding curative technical amendments (1993).

The 16-month period between the filing of the petitioner's application and the filing of the curative technical amendment, referred to in the court's judgment (App. 1a), was largely consumed by 11 months when the application remained pending before the agency awaiting processing. [2] The amendment did not

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[2] The application was filed in November 1984 (App. 32a, caption). It was processed and designated for hearing in November 1985 (App. 33a). The amendment was filed in April 1986 and the hearing record was closed in May 1986 (App. 41a, 34a).

delay the proceeding a single day. [3] Accordingly, acceptance of the amendment, by both the administrative law judge (App. 49a-51a) and the review board (App. 25a-27a), did not frustrate the statutory purpose of avoiding delays and hastening the provision of new broadcast service. On the other hand, rejection of the amendment did frustrate the statutory objective of having a choice available for the selection of the most likely applicant to provide program service in the public interest, *i.e.*, reducing the field from two applicants to one applicant, eliminating the petitioner who was the first choice of the administrative law judge (App. 59a) and the review board (App. 30a), leaving only the respondent here, who was the last choice of the administrative law judge (App. 59a) and the review board (App. 30a), for an uncontested grant of the construction permit.

Commencing with the 1991 policy change regarding curative financial amendments, and then with the 1993 policy change regarding curative technical amendments, it was clear that the FCC was strongly wedded to its new policy to be tough on curative amendments and weed out applicants rather than encouraging them to stay in comparative hearings (App. 61a, 3a).

Moreover, in dealing with its policies relative to broadcast hearing proceedings, for decades the FCC has almost always (1) adopted or changed policies in adjudications or other non-rulemaking context and (2) has applied new or changed policies retroactively. *E.g.*, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC2d 393 (1965), comprehensive statement of policies to govern hearings adopted without notice or comment and applied retroactively; *Mid-Florida Television Corp.*, 33 FCC2d 1, 18 (Rev. Bd. 1972) and *TV 9, Inc. v. FCC*, 495 F.2d 929

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[3] The seven year period from 1986, when the amendment was filed and comparative hearings were held before the administration law judge, and 1993, when the FCC decided the case, reflected delays for a variety of reasons that were unrelated to either the petitioner or the filing of its transmitter site amendment (App. 4a).

(D.C.Cir. 1974), *cert. denied*, 419 U.S. 986 (1974), new policy to grant a comparative preference to minorities adopted in agency and court adjudications and applied retroactively; *Gainesville Media, Inc.*, 72 FCC2d 799, 805 (Rev. Bd. 1978), new policy to grant a comparative preference to women adopted in agency adjudication and applied retroactively; [4] *Anax Broadcasting, Inc.*, 87 FCC2d 483 (1981), changed policy to allow for two-tiered ownership structures regarding comparative credit for management by voting ownership parties, vastly impacting applications and hearing cases, adopted in agency adjudication and applied retroactively; [5] *Channel 32 Broadcasting Company*, 6 FCC Rcd. 5188 (1991), changed policy to include educational television services in determining whether commercial television applicants will provide service to underserved areas, adopted in agency adjudication and applied retroactively; the 1991 policy change from leniency to strictness in accepting curative financial amendments (App. 61a), was adopted in an agency adjudication and has been applied retroactively.

Further, the agency is not known for punctuality in dealing with petitions for reconsideration. In the court below, the petitioner cited an example of a petition for reconsideration in a broadcast licensing matter, for which the statute requires agency action within 90 days, that was then pending for 20 months notwithstanding inquiries from the petitioning party. (App. 70a). As of this writing, the petition for reconsideration remains pending, the delay is now 31 months and still counting.

Under all the foregoing circumstances, and given its understanding of the law regarding court review of "retroactivity"

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[4] Until held unconstitutional 14 years later in *Lamprecht v. FCC*, 958 F.2d 382 (D.C.Cir. 1992).

[5] The FCC's comparative credit for management by the voting ownership parties was held to be arbitrary and capricious in *Bechtel v. FCC*, 10 F.3d 875 (D.C.Cir. 1993).

cases in agency adjudications, the petitioner elected to proceeding directly to the court of appeals, rather than seek reconsideration of the retroactive application of changed policy which had occurred here.

The exclusive jurisdiction of the Court of Appeals for the District of Columbia Circuit in this licensing case is derived from 47 U.S.C. §402(b). The sole basis for the appeal by the petitioner was the error in announcing and applying the changed policy to it without notice some five to seven years after the operative events when the petitioner amended its application. Brief of Appellant Carmen Matias and Andrew N. Wimbish, Jointly, filed June 17, 1994. The respondents argued that the appeal should be denied for failure to raise this "retroactivity" issue below and also advanced certain arguments relative to the merits of the "retroactivity" issue itself. Briefs of FCC filed July 18, 1994 (appellee below) and Intervenor Montgomery County Media Network, Inc. d/b/a Imagists filed August 2, 1994 (intervenor below).

The court of appeals did not reach the merits of the "retroactivity" arguments, denying the appeal for failure to raise the "retroactivity" issue below (App. 1a). In support, the court of appeals cited 47 U.S.C. §405 and its recent decision in *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1171 (1994).

47 U.S.C. §405 provides that a petition for reconsideration is a condition precedent to judicial review where a party relies on questions of fact or law on which the FCC "has been afforded no opportunity to pass." (App. 73a). However, this provision, which dates back to the beginnings of the agency itself some 60 years ago, has long been held to codify court case law regarding exhaustion of administrative remedies. Notwithstanding the apparent unyielding language of the statute, that case law provide for various situations in which a matter need not be raised with the FCC before taking an appeal including situations where the agency in reality had the opportunity to consider the matter or where its

predisposition to rule a given way was clear. That interpretation of this statute is referred to in the *Petroleum Communications* opinion relied on by the court of appeals, 22 F.3d at 1169-1170.

In *Petroleum Communications*, the court of appeals held that an appeal should be dismissed for failure to raise objections to procedural errors by the FCC regarding the required content and times of filing certain applications relative to cellular radiotelephone service in areas not receiving existing cellular service. This was a straightforward case of FCC rules and requirements and an appeal therefrom. The court did not have before it a case of "retroactive" adoption and application of a changed policy in an agency adjudication, nor did the court address the long-standing and contrary precedent relative to court review of "retroactivity" issues to which we now address our attention.

REASONS FOR GRANTING THE WRIT

The ruling of the court of appeals is contrary to or inconsistent with decisions of this Court, with other decisions of the Court of Appeals for the District of Columbia, and with decisions of courts of appeal in a number of other circuits. The ruling undermines the principle that the courts, not administrative agencies, have the primary role in adjudicating the law of "retroactivity," which is fundamental to our system of jurisprudence. This Court has not heretofore addressed the precise question that is now presented.

1. ***The importance of the law of "retroactivity" in relation to federal administrative jurisprudence.***

The law of "retroactivity" is a fundamental component of our system of jurisprudence. It is the structure by which fairness to individual parties is balanced against the needs of the community or the nation as a whole in legislation, in case-by-case adjudication and in administrative law which employs both the

legislative and the adjudicatory processes.

Concern with regard to retroactive application of laws to parties having no prior knowledge of the legal effect at the time of the operative facts has been traced to the Roman Code, which provided that statutes should be construed prospectively in the absence of an express provision to the contrary. Corpus Juris Civilis, Code 11.14.7. This rule of construction was carried over into the English law by Bracton and by Coke. Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 N.W. L. Rev. 540 (1956); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776-77 (1936). It was reflected in our constitution, which prohibits the enactment of ex post facto legislation by the Congress, U.S. Const., art. I, §9, cl. 3, and by the States, *ibid*, art. I, §10, cl. 1. From the very outset, this Court has devoted a substantial portion of its time and energies to the law of retroactivity, commencing with such early cases as *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798) (interpreting the scope of the term "ex post facto" as used in these constitutional provisions). Recent decisions by this Court include, for example, *James B. Beam Distilling Co. v. Georgia*, 115 L.Ed.2d 481 (1991) (retroactivity in Article III court adjudications) and *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (retroactivity in agency rulemaking pursuant to Congressional legislation).

The past 50 years has witnessed an explosive development of administrative law jurisprudence, with the creation of many new agencies, the expanded role of the executive departments, the continuing adoption of new or revised legislative programs, and the continuing adoption of new or revised agency regulations and policies. In the process, trial examiners, internal review boards and the top levels of decision-makers at the agencies turn out vast quantities of adjudications, many of which are reviewed in the courts. During this period of time, the docket of cases accepted by this Court has regularly included federal administrative law cases, as the needs of our nation continue to call for its ultimate judicial

determinations to guide and shape the lawful development of that burgeoning process. We believe that such a need is reflected in this case, to decide a question not previously considered by the Court, to resolve a conflict between the case at bar and decisions in various of the circuits, and to thusly clarify the respective roles of the courts and the agencies in deciding "retroactivity" questions of law.

2. ***Previous decisions of this Court do not resolve the issue presented here.***

The landmark decision of this Court on the law of retroactivity in administrative agency adjudications is *SEC v. Chenery Corp*, 332 U.S. 194 (1947). There, corporate officials submitted a reorganization plan to the SEC for approval and while that was pending they purchased stock of the corporation that would give them an advantage under the proposed reorganization plan. At the time of the operative facts, this did not violate any SEC policy. However, in considering the actions of the Chenery corporate officials, the SEC adopted a policy that such insider trading activity should not be permitted. The company appealed to the court of appeals, which held that the policy was not lawfully adopted. This decision was on the merits of the adoption of the policy. There was no consideration of a retroactivity issue at that time. *Chenery Corp. v. SEC*, 128 F.2d 303 (D.C.Cir. 1942), Circuit Judge Miller *dissenting*. This Court agreed that the policy had not been lawfully adopted, expressed views regarding matters which the agency should have considered and returned the case to the agency for further proceedings. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), Justices Black, Reed and Murphy *dissenting*, Justice Douglas *not participating*. Again, no consideration was given to the retroactivity issue.

The SEC considered the additional matters identified by this Court and again decided to adopt the policy. The circuit court reversed and held the SEC had done so unlawfully. As before, this review was of the merits of the policy, not any retroactivity issue.

Chenery Corp. v. SEC, 154 F.2d 6 (D.C.Cir. 1946). This Court reversed the circuit and upheld the lawfulness of the policy. In addition, this Court for the first time considered and ruled on the retroactivity issue as well. *SEC v. Chenery Corp., supra,* Justices Frankfurter and Jackson *dissenting*, Justice Burton *concurring*, the Chief Justice and Justice Douglas *not participating*. The Court gave no indication that the retroactivity issue had been raised below, or that it needed to know the views of the SEC. Rather, the Court proceeded to delve into such facts and considerations that it felt pertinent to balancing the contrasting interests – of the public in an immediate application of agency policy, and of the parties to whom a new policy had been applied retroactively.

The *Chenery* decision suggests that the courts need give little or no deference to the views of administrative agencies in deciding retroactivity cases. However, *Chenery* does not address the issue of whether a party should be denied access to a court which otherwise has jurisdiction to litigate a retroactivity question because it was not explicitly raised by the aggrieved party before the agency, to whom the retroactive implications were obvious from the very nature of its action.

Neither do other opinions of this Court dealing with agency adjudications. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), upholding a policy change by adjudication against an argument that a rulemaking proceeding should have been employed, while the agency below had in fact considered the argument of the aggrieved party upon petition for reconsideration of its initial decision, 196 NLRB 827 (1972), this was not discussed or relied upon in the Court's opinion. In *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), while civil court litigation was in progress over an eviction from public housing, a revised policy was adopted and applied to the situation by the Department of Housing and Urban Development. The retroactivity issue was addressed by the Supreme Court of North Carolina and then by this Court without reference to any proceedings before or deliberations by HUD regarding the pros

and cons of giving retroactive effect its revised policy. In *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) this Court reversed the court of appeals and upheld action by the FCC denying a license renewal application for a radio station for false statements to the agency, notwithstanding the argument that this was an "unannounced policy change" from prior cases in which false statements had not enlisted license denial. Neither the opinion of this Court, nor the majority and dissenting opinions of the court of appeals, 153 F.2d 623 (D.C.Cir. 1946), Groner, C.J. dissenting, made any reference to whether the "retroactivity" issue had been argued before the agency or whether that mattered.

3. ***Previous decisions in the District of Columbia circuit are at odds with the judgment entered here.***

In *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C.Cir. 1972) the court of appeals held that the agency erred in applying a changed policy (regarding an employer's reinstatement and back pay obligations to former strikers) because the benefits of an immediate application of that new policy to the case at bar were outweighed by the detriment to the parties who had relied on the earlier policy. Throughout the Court's opinion, there is no reference to any NLRB decision below dealing with the law of retroactivity. The Court went to work on that law itself, detailing five factors to be considered, and conducting its own analysis of those five factors, saying, "Which side of this balance preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision." 466 F.2d at 390.

In *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C.Cir. 1987), before the entire panel, Judges Mikva, Robinson and Edwards dissenting, the majority upheld a retroactive change in factors in comparative proceedings for licenses issued by FERC to operate hydroelectric power plants. Again, throughout the entire text of the majority and dissenting opinions, there is no reference to any decision by the agency

addressed to the law of retroactivity. Both opinions went right to work on the five factors to be considered. The dissenting opinion added the following comments to the statement in *Retail, Wholesale* regarding the ability of the courts to decide retroactivity issues for themselves:

> Several additional principles emerge from cases in which this court has reviewed agency decisions applying a new standard retroactively. First, whether a new standard should be applied is a question of law. Agencies possess no particular expertise on the issue of retroactivity, and reviewing courts in turn have "no overriding obligation of deference" to an agency's decision to give retroactive effect to a new rule. [citing *Retail, Wholesale*]. Second, agency decisions to apply an order retroactively must be the product of rational analysis, and "the law requires that an agency explain...how it determined that the balancing of the harms and benefits favors giving a change in policy retroactive application." *Yakima Valley Cablevision v. FCC*, 794 F.2d 737, 746 (D.C.Cir. 1986). Third, an agency's failure to consider the less drastic alternative of prospective application may be considered arbitrary and capricious and thus constitute grounds for reversal. *Id.*

826 F.2d at 1094.

In *Local 900, Intern. U. of Elec., Etc. v. NLRB*, 727 F.2d 1184 (D.C.Cir. 1984), the court of appeals refused to consider a substantive argument (regarding superseniority rights) because the argument had not been raised below, as required by a statute applicable to that agency, Section 10(e) of the National Labor Relations Act, 29 U.S.C §160(e), providing that issues must be raised before the agency as a condition to taking an appeal from

the agency decision. [6] However, the court of appeals did consider "retroactive" issue, which had not been raised directly below, but which was implied from the facts and circumstances. On this score, the court stated: "Retroactivity is necessarily an issue any time adjudication results in a new rule of law." 727 F.2d at 1193-94.

4. ***Decisions in other circuits also are at odds with the judgment below.***

In the eighth circuit, the distinction between substantive agency issues and "retroactivity" legal issues has been made clear in *NLRB v. International Brotherhood*, 225 F.2d 343 (8th Cir. 1955). A substantive agency issue (seniority rights) was not considered by the court of appeals because it had not been raised below, following 29 U.S.C. §160(e). 225 F.2d at 346. However, a retroactivity issue was considered, even though it had not been raised below either. This is apparent from the text of the court's opinion, 225 F.2d at 346-48 and also from agency opinions in which the trial examiner decided the case under the former policy, the changed policy was applied in the decision of the Board, and there is no Board decision reflecting any petition for reconsideration of that decision. *Pacific Intermountain Express Company*, 107 NLRB 837 (1954).

In the second circuit, the case of *NLRB v. National Container Corp.*, 211 F.2d 525, 534 (1954) is similar. The Board made a policy change in its decision, reversing the Trial Examiner who relied on the former policy, and there is no evidence from the reported opinions that the aggrieved party sought reconsideration under 29 U.S.C. §160(e), *National Container Corporation*, 103 NLRB 1544 (1953), nor is there any reference to such

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[6] This provision, reproduced in App. at 72a, is similar to Section 405 of the Communications Act, 47 U.S.C. §405, relied upon by the court below in the instant case, reproduced in App. at 73a.

reconsideration at the agency in the text of the opinion of the court of appeals. Yet, the court entertained and considered an appeal of the "retroactivity" issue. Also in the second circuit, the case of *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (1966), agency decisions reported in *Majestic Weaving Co., Inc. of New York*, 147 NLRB 859, 149 NLRB 1523 (1964), involved review of a policy change where the aggrieved party did avail itself of seeking reconsideration before taking the appeal. While the court of appeals took this into account, there is nothing to indicate that the court would have rejected the appeal for failure to raise the "retroactivity" question in a petition for reconsideration at the agency below.

Laidlaw Corporation v. NLRB, 414 F.2d 99 (1969) (rehearing denied September 2, 1969), *cert den.*, 397 U.S. 920 (1970), was decided in the seventh circuit. The Trial Examiner applied former policy that was changed in the Board's decision; there was no reported reconsideration of that ruling, *The Laidlaw Corporation*, 171 NLRB 1366 (1968), nor is such reconsideration referred to in the text of the court's opinion. The court of appeals accepted and considered the appeal of the retroactive application of changed policy.

The *Laidlaw* policy change was applied to various other cases including the *Retail, Wholesale* case in the District of Columbia Circuit referred to earlier. Other *Laidlaw* policy change cases where the change was made by the Board and there is no reported petition for reconsideration prior to taking an appeal include *C. H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983 (5th Cir. 1970), agency action reported in *C. H. Guenther & Son, Inc.*, 174 NLRB 1202 (1969), and *NLRB v. Hartmann Luggage Company*, 453 F.2d 178 (6th Cir. 1971), agency action reported in *Hartmann Luggage Company*, 183 NLRB 1246 (1970).

To a similar effect (involving policy changes other than the *Laidlaw* policy change) are *NLRB v. E & B Brewing Company*, 276 F.2d 594 (6th Cir. 1960), agency action reported in *E & B*

Brewing Company, Inc., 122 NLRB 354 (1958), and *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952) (rehearing denied March 2, 1952), *cert den.*, 366 U.S. 908 (1961), agency action reported in *Guy F. Atkinson Co. and J. A. Jones Construction Co.*, 90 NLRB 143. The *Atkinson* opinion draws the following distinction between substantive agency issues and "retroactivity" law issues:

> When an agency's determination, whether of fact, or of law, relates to physical or economic facts, with respect to which the agency's experience is calculated to give it special competence, there is reason for assuming that the determination should, so far as possible, be regarded as within the discretion of the agency. The matter now before us, we apprehend, is not one of that kind. We deal with a problem [retroactive application of new law] which courts have frequent occasion to consider and upon which we think it cannot be said that the board or commission has superior opportunity for knowledge.

195 F.2d at 150-51.

5. ***None of the circuit court decisions expressly resolves the issue presented here.***

At least some of the circuit court decisions are premised on the concept that the application of a new or revised policy in an agency adjudication inherently raises the question of whether that agency action should be applied "retroactively" to parties that have proceeded with operative facts under a former policy. Numerous circuit court decisions, in fact, consider a "retroactivity" issue that was not raised at the agency below by a petition for reconsideration of the agency adjudication announcing the policy change. However, we have found no circuit court decision addressed squarely to the issue presented here, i.e., whether agency review of the pros and cons of the "retroactive" effect of its policy change is a prerequisite for court review of the

"retroactivity" question of law, or by other means. We suspect that the reason for the absence of any such court holding is that the courts, agencies and parties have generally assumed such to be the law.

On the other hand, we have found no circuit court decision -- before this one -- holding that a party is precluded from appellate court review of a changed policy in an agency adjudication for failing to raise the matter before the agency, e.g., by seeking reconsideration of the agency decision effecting the retroactive policy change or in some other manner.

6. ***The time is ripe for the Court to resolve the "retroactivity" issue presented in this case.***

Accordingly, the time is ripe for this Court to resolve the matter and this case presents the precise and narrow factual and legal framework for this Court to do so, providing clear guidance to all courts, agencies and parties involved in the ongoing, massive program of administrative agency jurisprudence.

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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January 17, 1995 Counsel for the Petitioner

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Filed October 17, 1994; Amended October 18, 1994

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 93-1328 **September Term, 1993**

CARMEN MATIAS, *et al.*, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

On Appeal from an Order of the Federal Communications Commission

BEFORE: WALD, SENTELLE and ROGERS, *Circuit Judges*

J U D G M E N T

This cause came to be heard on appeal from a decision of the Federal Communications Commission, and it was briefed and argued by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b).

The Commission dismissed petitioners' application for a permit to construct a new television station because the application lacked a suitable transmitter site, and petitioners had not shown "good cause" to file a curative amendment over sixteen months later. Petitioners contend that the agency's refusal to entertain their amendment reflects an impermissible retroactive application of a new, stringent policy against late filings.

Section 405 of the Communications Act of 1934, as amended, provides that a petition to the FCC for reconsideration is a condition preceent to judicial review when

the party seeking review "relies upon questions of fact or law upon which the Commission...has been afforded no opportunity to pass." 47 U.S.C. §405(2). Petitioners' argument that the Commission decision resulted from an improper retroactive application of a new policy was first brought to the Commission's attention in petitioners' brief to this Court; it is therefore a "question[] of...law upon which the Commission...has been afforded no opportunity to pass." We have recently interpreted §405 to require that a similar claim be presented to the agency before this Court would consider it. *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 11171 (1994) (declining to reach the argument that a Commission decision resulted from a discriminatory application of a particular policy on the ground that the Commission had not been given the "first crack" at it). It is therefore

ORDERED and **ADJUDGED**, by this Court, that in No. 93-1328 the petition is dismissed.

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C.Cir. R. 41(a)(2).

Per Curiam
For the Court:

Ron Garvin, Clerk

[8 FCC Rcd 2763] FCC 93-196

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

MONTGOMERY COUNTY MEDIA NETWORK, INC. d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY	File No. BPCT-841129KK
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G-A COMMUNICATIONS, INC.	File No. BPCT-841129LE

For Construction Permit
for New UHF Television Station.
Conroe, Texas

Adopted: April 13, 1993; Released: April 21, 1993

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Marshall not participating.

1. The above captioned proceeding involving applications for a new UHF television station in Conroe, Texas is pending before the Commission. In an Initial Decision, Administrative Law Judge Edward Luton disqualified Wood Broadcasting Company on a financial issue, and preferred Carmen Matias and Andrew N. Wimbish, Jointly (Matias-Wimbish) over Imagists and G-A Communications, Inc. (GAC), and two other applicants that

subsequently dismissed their applications, on the standard comparative issue. *DLBS Incorporated*, 3 FCC Rcd 6710 (ALJ 1988).

2. GAC, Imagists, and Wood filed exceptions to the Initial Decision with the Review Board. After hearing oral argument, the Board remanded the proceeding to the ALJ "[t]o determine whether JoAnn Garcia [a principal of GAC], lied to, misrepresented facts to, or lacked candor with respect to the Blanco, Texas comparative television (Channel 52) proceeding [cite omitted]; and, if so, the effect thereof on the basic qualifications of [GAC] to be a Commission licensee." *Imagists*, 4 FCC Rcd 3749, 3752-53 ¶ 13 (Rev. Bd. 1989). In a Supplemental Initial Decision, Judge Luton disqualified GAC on the misrepresentation issue. *Imagists*, 6 FCC Rcd 2963 (ALJ 1991).

3. The Review Board affirmed both the ALJ's disqualification of GAC on the lack of candor and misrepresentation issues, and those portions of the initial decision disqualifying Wood on the financial issue and preferring Matias-Wimbish over Imagists on the standard comparative issue. *Imagists*, 6 FCC Rcd 7440 (Rev. Bd. 1991). GAC and Imagists seek Commission review of the Review Board's decision. Wood has not filed an application for review; the Board's denial of its application is therefore final.

4. Based upon our review of the pleadings before us, [1] we agree with the Board's disqualification of GAC on the lack of

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[1] The following pleadings have been filed: (a) application for review, filed January 17, 1992, by Montgomery County Media Network d/b/a Imagists; (b) application for review, filed January 22, 1992, by G-A Communications, Inc.; (c) opposition to application for review, filed February 6, 1992, by the Mass Media Bureau; (d) opposition to application for review of G-A Communications, filed February 6, 1992, by the Mass Media Bureau; and (e) consolidated opposition to applications for review, filed February 6, 1992, by Carmen Matias and Andrew N. Wimbish.

candor and misrepresentation issues. [2] We find, however, that Matias-Wimbish's April 14, 1986 site amendment was not supported by good cause, as required by section 73.3522(b)(i) of the Commission's rules for post-designation amendments. We therefore dismiss Matias-Wimbish's application for lack of a transmitter site and award the construction permit to Imagist, inasmuch as it is the only basically qualified applicant.

5. *Background*: When Matias-Wimbish filed its application on November 29, 1984, it specified a transmitter site that was 22 miles short-spaced. Alerted to the short-spacing by the filing on January 16, 1985 of an Informal Objection by Association of Maximum Service Telecasters (AMST), the applicant did not file an amendment specifying a properly spaced site until April 14, 1986. In response to an "air hazard" determination from the FAA. Matias-Wimbish filed a second amendment on May 14, 1986, reducing the height of its proposal tower from 1150 to 750 feet.

6. The ALJ orally accepted the first amendment on May 13, 1986, but initially rejected the second amendment, holding that it did not meet the requirement of 73.3522(b)(i) that engineering amendments must be necessitated by events that the applicant could not have reasonably foreseen. *DLBS Incorporated*, FCC 86M-2184 ¶¶ 8-12 (July 8, 1986). In particular, the ALJ faulted Matias-Wimbish for not discovering that, more than a year before its April 1986 site amendment, the FAA had refused to approve a competing applicant's proposed location of an 1150 foot tower at a nearby site and ultimately approved only a 745 foot tower at that site. In the initial decision, however, the ALJ reversed himself and accepted Matias-Wimbish's May 1986 height amendment, concluding that "Matias-Wimbish's 'carelessness' had nothing to do with its ability to anticipate the FAA's later expressed

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[2] Because we agree that GAC is not basically qualified, there is no need to consider its claim that the ALJ erred in concluding that Matias-Wimbish's proposal is comparatively superior to GAC's.

disinclination to approve a 1,150 foot tower." *DLBS Incorporated*, 3 FCC Rcd at 6720 ¶¶ 129-30. Citing *Women's Broadcasting Coalition*, 59 RR 2d 730 (1986), the ALJ reasoned that "there was a reasonable possibility of FAA clearance . . . until the time of the FAA action." Id. at ¶ 130. Quoting extensively from the initial decision, the Board upheld the ALJ's acceptance of the amendment. 6 FCC Rcd at 7450 ¶¶ 43-45.

7. *Discussion*: For the reasons set forth below, we reverse the Board and the ALJ on this point. We find that Matias-Wimbish's April 14, 1986 amendment specifying a transmitter in compliance with the minimum mileage separation requirements of section 73.610 of the Commission Rules is not supported by good cause. We therefore dismiss Matias-Wimbish's application for lack of a suitable transmitter site, without determining whether its subsequent May 14, 1986 amendment reducing its antenna height to secure FAA clearance also lacked good cause.

8. To establish good cause for a post-designation amendment, "the applicant must demonstrate that it has acted with due diligence, that the amendment was not required by its voluntary act, that no additional issues or parties would be required, that the hearing process will not be disrupted, that there will be no prejudice to competing applicants, and that the applicant will not gain a comparative advantage." *California Broadcasting Corp.*, 90 FCC 2d 800, 808 ¶ 17 & n.28 (1982), citing *Erwin O Conner*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970). Section 73.3522(b)(i) of the Rules provides that, in addition to the usual good cause requirements, the applicant must also show that engineering amendments are required by events that the applicant could not have reasonably foreseen.

9. The April 14, 1986 site amendment meets some of these criteria without difficulty in that its acceptance did not require the addition of any parties or issues, and the amending applicant would not gain a comparative advantage. However, the amendment was required by the applicant's voluntary act inasmuch

as it initially selected a grossly short-spaced site. [3] Likewise, the applicant failed to exercise due diligence in waiting fifteen months after learning that its original site was short-spaced to amend to a properly spaced site. Even the ALJ, who had orally accepted the amendment, later acknowledged that the applicant had not displayed diligence "of a high order" in this respect. *DLBS Incorporated*, FCC 86M-2184 at ¶ 7. He explained, however, that "where an applicant is attempting to cure a potentially disqualifying defect in its application, diligence should be interpreted in light of the equities of the case." *Id.* at ¶ 5, citing *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981). Although noting that "[i]t is difficult to find . . . any equities in favor of Matias-Wimbish," the ALJ found that the applicant had nevertheless acted with due diligence because "this is not a situation in which the applicant did absolutely nothing during the passage of time." *Id.* at ¶ 7.

10. To the extent that the ALJ suggested that the diligence standard is more lenient where an applicant seeks to cure a potentially disqualifying defect, we have modified our former practice of liberally accepting post-designation amendments that cure disqualifying defects, such as the loss of a transmitter site or

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[3] In *Eugene Walton*, 6 FCC Rcd 6071, 6075 ¶ 16 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992), the ALJ's denial of an applicant's request for a waiver of the short-spacing rules was held to be reasonably foreseeable (and the applicant thus failed to establish good cause for a site amendment under section 73.3522(b)), given Commission precedent that such waivers are granted only if suitable, properly spaced sites are shown to be unavailable and strong public interest considerations are shown to support the waiver and given the applicant's failure to even attempt either showing. Like the unsuccessful applicant in *Walton*, Matias-Wimbish cannot meet the unforeseeability test of section 73.3522(b): It not only specified a site that was 22 miles short-spaced (Walton's site was short-spaced by 35 meters), it also neglected to request a waiver which, given the extent of the short-spacing, would have likely been denied. Thus, the site amendment was required by Matias-Wimbish's voluntary act (i.e., specifying a short-spaced site) and the need for that amendment was clearly foreseeable.

a financial commitment. [4] Originally concerned with promoting the broadest choice of applicants in an effort to obtain the optimum in ultimate service to the public, we have tempered this objective somewhat in view of our "responsibility to provide service to the public in the most efficient, expeditious manner possible. [5] As we have previously stated, "[t]emporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." [6] This delay "exact[s] an economic toll on both the Government and the applicants," [7] in that "the public is deprived of a valued service, and the ultimate licensee is deprived of the opportunity to provide that service" during the selection process. [8]

11. Thus, we do not allow "applicants . . . to inordinately delay the processing of applications from applicants who are willing and able to proceed with the prosecution of their applications." [9] In our view, defective proposals disserve the public interest, even if, as in this case, any such deficiencies are remedied before the start of the evidentiary hearings. [10] In this regard, a competing party

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[4] *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603-04 ¶¶ 12, 13 & n.5 (1991).

[5] *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶¶ 2-3 (1986).

[6] *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134-35 n.7 (1985).

[7] *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 53 (1991).

[8] *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd 4050 ¶ 3 (1990).

[9] *Cuban-American Limited*, 5 FCC Rcd 3781, 3782 ¶ 5 (1990).

[10] See, e.g., *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC 3237 (1992), holding that a site amendment submitted well before the start of the evidentiary hearings but ten months after the applicant

has a valid interest in the prompt resolution of a proceeding that is prejudiced if it must consider multiple proposals from a single applicant. [11] Indeed, any time and expense that an applicant devotes to preparing for the evidentiary hearing based on an opponent's initial proposal is forfeited if that proposal is amended. The clear waste of private and public resources that this entails is exacerbated in multiparty proceedings where a site change by one applicant affects the hearing preparations of a large pool of competing applicants. This delays service to the public even if the amendment does not require additional hearings, additional or modified issues, or the addition of new parties. Liberally permitting curative amendments further undermines our efforts to reduce the time and money devoted to our comparative process to the extent that it discourages future applicants from exercising the maximum possible care in formulating their proposals.

12. Given our heightened concern with avoiding undue delays that retard the provision of new service, we take this opportunity to review what constitutes due diligence under section 73.3522(b). As an initial matter, an applicant must show that it acted promptly after it discovered, or it should have discovered, the potentially disqualifying deficiency. [12] Clearly, an applicant that sits idly by,

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discovered the short-spacing was not supported by good cause.

[11] See *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1031 ¶ 6 (Rev. Bd. 1983), aff'd sub nom. *Royce International Broadcasting Company*, 820 F.2d 1332 (D.C. Cir. 1987).

[12] Compare *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5193 ¶ 20 (1991) (delay in amending to a new site is not excused where the applicant had not bothered to check the status of its FAA application, relying instead on its engineer to advise it of any deficiency) with *Radio Lake Geneva Corporation*, 7 FCC Rcd 5586, 5589-90 ¶¶ 13-14 (Rev. Bd. 1992), review denied, FCC 93-155 ¶ 2 & n.3 (rel. March 26, 1993) (applicant that chose to "fight rather than switch" on the FAA's tentative air hazard finding exercised due diligence in amending within 30 days of the final Determination of Air Hazard, where its dealings with the FAA were sufficiently reasonable, prudent

either doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously, lacks diligence. [13]

13. We recognize that some defects can be cured more readily than others. Thus, how quickly an applicant must act in order to establish diligence will necessarily vary depending on the facts of each case. [14] We have accorded the ALJs broad authority to regulate the course of multiparty proceedings, permitting them to

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and diligent to establish good cause for its site amendment); *Harrison County Broadcasting Co.*, 6 FCC Rcd 5819 (Rev. Bd. 1991), review denied, 7 FCC Rcd 2993 (1992) (applicant exercised due diligence in amending to correct the geographic coordinates of its transmitter site within 30 days of receiving *actual* notice in the Hearing Designation Order that its engineer had plotted coordinates outside of the actual boundaries of the property selected as its site).

[13] See *Texas Communications*, 6 FCC Rcd at 5193-94 ¶¶ 21-22 (applicant that spent eight months looking for a site that would solve the FAA's excessive height and EMI problems, rather than immediately reducing its antenna height, lacked due diligence); *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992) (applicant that waited ten months for action on its facially deficient waiver request, rather than immediately amending to a properly spaced site, lacked due diligence); *Goodlettsville Broadcasting Co.*, 5 FCC Rcd 4593, 4593-94 ¶ 8 (1990) (applicant that chose to recalculate its original site based on new rules that it knew, or should have known, were not yet effective, rather than amending to a properly spaced site within the time prescribed by the ALJ, lacked due diligence); *Cuban-American Ltd*, 5 FCC Rcd 3781, 3782 ¶¶ 10-12 (1990) (applicant that sought after the ALJ's deadline to amend to a new site, rather than reducing its antenna height upon being advised by its engineer that the FAA would not approve a tower that tall, lacked due diligence).

[14] Compare *Elijah Broadcasting*, 3 FCC Rcd 5148 (Rev. Bd. 1988), review denied, 5 FCC Rcd 5351 (1990) (site amendment accepted where the six month delay in amending to a new transmitter site was due to special problems – that is, the area's rapid development, strict architectural standards, and FAA considerations – in locating a complying site); with *Texas Communications*, 6 FCC Rcd at 5193 ¶ 19 (site amendment rejected where no reason offered at the hearing for an eight month delay in amending to new site after the applicant learned of the FAA's rejection of its original site).

adopt appropriate procedures to facilitate the prompt performance of their responsibilities. *Cuban-American Limited*, 5 FCC Rcd at 3782 ¶ 5. As a result, the ALJs have discretion to decide in the first instance whether an applicant has acted with sufficient promptness upon learning of a deficiency in its original proposal, and we will generally not substitute our judgment for that of a presiding officer. We emphasize, however, that the general guideline governing such determinations is clear -- that the agency has a public interest obligation to provide new service to the public as expeditiously as possible.

14. In view of the foregoing, we urge applicants, whenever possible, to submit curative amendments no more than 30 days after they learn, or should have learned, of the deficiency requiring an amendment. [15] An applicant waiting more than 30 days to file a petition for leave to amend should be prepared to explain the need for additional time, and it may be asked to document that, despite its failure to amend within 30 days, it took immediate steps upon learning of the deficiency. [16] We note further that, in the absence of unusual circumstances, a delay of more than six months has long been presumed to be excessive. [17]

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[15] This is consistent with section 1.65 of the rules, which affords applicants 30 days in which to *report* any matter of decisional significance, and with section 73.3522(b), which affords applicants 30 days after the designation order to file amendments addressing any matter raised therein as a matter of right and provides that amendments filed more than 30 days after the designation order must be supported by good cause.

[16] See *Capitol City Broadcasting Co.*, 6 FCC Rcd 5525 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 2629 ¶ 3 & n.2 (1992), in which we upheld the dismissal of an application for not timely amending its financial proposal, where the applicant had not documented its claim to have exercised due diligence in obtaining new financing.

[17] *California Broadcasting*, 90 FCC 2d at 808 ¶ 19, in which the Commission agreed that the failure to amend to a new site for more than six months would ordinarily not constitute due diligence, but nevertheless found

Therefore, an applicant seeking to amend more than six months after the defect was, or should have been, discovered would have a heavy burden of establishing due diligence.

15. Turning to the specific facts of this case, the ALJ found, and the Board agreed, that Matias-Wimbish had demonstrated due diligence because "this [wa]s not a situation in which the applicant did absolutely nothing" upon learning of the short-spacing. *DLBS Incorporated*, FCC 86M-2184 at ¶ 7; *Imagists*, 6 FCC Rcd at 7451-52 n.6. While we do not question the validity of this observation, [18] we find that the "quantity and quality" of Matias-Wimbish's efforts to obtain a properly spaced site fall far short of due diligence. [19] It is undisputed that Matias-Wimbish

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due diligence because the applicant began exploring new sites promptly after the *unforeseeable* creation of a national park deprived it of its original site. See also *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1328 (1978) (six month delay in filing a site amendment held not to constitute due diligence, given the applicant's continued reliance on a site that he knew was unavailable).

[18] Compare *Texas Communications*, 6 FCC Rcd at 5193 ¶¶ 20-21 (delay not excused where the applicant had not bothered to check on the status of its request for FAA clearance); *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992) (applicant did not display due diligence waiting 10 months to amend to a properly spaced site in filing a facially deficient waiver -- and waiting for action on that request -- instead of promptly amending to a properly spaced site); with *Elijah*, (delays attributable to difficulties in locating new site are not fatal to a finding of due diligence).

[19] There is no merit, however, to Imagists' claim that the Bureau should have dismissed Matias-Wimbish's application pursuant to section 73.3566(a), which provides for the dismissal of applications that are determined to be patently not in accordance with FCC rules unless accompanied by an appropriate waiver request. (Matias-Wimbish specified a short-spaced site, but it did not file a spacing waiver request.) In the case of television applications, as opposed to FM applications, it is appropriate to accept a television application specifying a short-spaced site, and make any waiver determination relating to that site at the hearing. *North Texas Media v. FCC*, 778 F.2d 28, 34 (D.C. Cir. 1985); *Kenter*, 62 RR 2d 1573 (1986).

delayed almost 5 months after the *Hearing Designation Order*, FCC MM-0792 (November 13, 1985) -- and 15 months after AMST's Informal Objection alerted it that the original site was short-spaced -- before amending to a properly spaced site. As noted above, even the ALJ, who accepted the amendment, acknowledged that Matias-Wimbish had not displayed diligence of a high order in this respect. *Memorandum Opinion and Order*, FCC 86M-2184 (July 8, 1986). The Board, on the other hand, found due diligence because, once the applicant learned of the deficiency, it hired an engineering firm to find a new site and "closely superintended their search for a site, contacting them twelve times by telephone and six times by letter." 6 FCC Rcd at 7451-52 n.6.

16. We disagree with the Board's characterization of these efforts as constituting close supervision of the engineering firm's site search. Over a period of more than a year, Matias-Wimbish claims to have contacted the firm a total of eighteen times (that is, an average of less than twice a month). It does not allege that it repeatedly reminded the firm of the urgency of this matter, let alone explored the reason for the delay or discussed how the site search might have been expedited. Nor does Matias-Wimbish allege any special problems that would explain its 15-month delay in amending to a new site, a length of time that far exceeds what we have long considered excessive. Rather, it states that, after receiving the Informal Objection in January 1985, it consulted an engineering firm, which confirmed in February or March 1985 that the specified site was in fact short-spaced and recommended that a new site be secured. At that time, the applicant hired the engineering firm to find a new site, believing it to be in a better position to negotiate with rural landowners than Wimbish who was concerned that predominantly white rural landowners would be unwilling to lease to him. The applicant alleges that the firm contacted six landowners on its behalf, but that the firm did not locate a suitable site until April 1986. In the 15 months that elapsed until the site amendment was filed, the applicant apparently did nothing more than urge the firm, through a series

of letters and telephone calls, to pursue the matter.

17. We do not fault Matias-Wimbish for retaining an engineering firm to assist in locating a new site. But, in the absence of any special circumstance explaining why it took 15 months to find a new site, we cannot find that such retention, in conjunction with the applicant's relatively meager efforts to expedite the firm's site search, establishes due diligence, particularly since none of the other applicants in this multi-party proceeding appear to have experienced similar delays in finding suitable sites. Thus, we reverse the ALJ's ruling, deny Matias-Wimbish's April 14, 1986 Petition for Leave to Amend, and reject its April 14 amendment. [20] Lacking a suitable fully-spaced site, Matias-Wimbish's application is not grantable and must therefore be dismissed.

18. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. § 1.115(g) of the Commission's Rules, the application for review filed January 17, 1992 by Montgomery County Media Network d/b/a Imagists IS GRANTED to the extent indicated above and DISMISSED in all other respects, [21] and that the application for review filed January 22, 1992 by G-A Communications, Inc. IS GRANTED in part and DENIED in part.

19. IT IS FURTHER ORDERED, That the ALJ's ruling

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[20] This case is distinguishable from *Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991), where the Board, having rejected the claim that the applicant was entitled to file an amendment as a matter of right, remanded the case so that the applicant could make a good cause showing. In contrast, there was never a question as to the need for a good cause showing in this case. Aware that it was required to make such a showing, Matias-Wimbish singularly failed to establish that it proceeded with due diligence. It is not entitled to a further opportunity to bolster its showing at this late date.

[21] Having concluded that Imagists is the only basically qualified applicant, those portions of its application for review dealing with the comparative issue are moot and have not been considered.

accepting the amendment, filed on April 14, 1986, by Carmen Matias and Andrew N. Wimbish, Jointly IS SET ASIDE, the petition for leave to amend IS DENIED, and that the attached amendment IS REJECTED.

20. IT IS FURTHER ORDERED, That the Review Board's Decision, *Imagists*, 6 FCC Rcd 7440 (Rev. Bd. 1991), IS MODIFIED, as set forth herein; that the grant of Matias-Wimbish's application (File No. BPCT-841129KK) IS SET ASIDE; that the application filed by Carmen Matias and Andrew N. Wimbish, Jointly (File No. BPCT-841129KK) IS DISMISSED; that the application of Montgomery County Media Network d/b/a Imagists (File No. BPCT-841129KF) IS GRANTED; and that the application of G-A Communications, Inc. (File No. BPCT-841129LE) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[6 FCC Rcd 7440] FCC 91R-112

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

Montgomery County Media Network, Inc., et al., d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS and ANDREW N. WIMBISH, Jointly	File No. BPCT-841129KK
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G-A COMMUNICATIONS, INC.	File No. BPCT-841129LE

For Construction Permit
for New UHF Television Station,
Conroe, Texas

Appearances

James L. Oyster, Esq. on behalf of Montgomery County Media Network, Inc. et al, d/b/a Imagists; *Ann C. Farhat, Esq.* and *Howard W. Simcox, Esq.* on behalf of Carmen Matias and Andrew N. Wimbish, Jointly; *Mark N. Uhlfelder, Esq., Mark F. Corriea, Esq., Howard G. Stavit, Esq.* and *Philip V. Jackmauh, Esq.* on behalf of Wood Broadcasting Company; *Donald E. Martin, Esq.* and *Spencer W. Weisbroth, Esq.* on behalf of G-A Communications, Inc.; and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau.

DECISION

Adopted: November 27, 1991; Released: December 23, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Now before the Review Board are the *Supplemental Initial Decision*, 6 FCC Rcd 2963 (1991) (S.I.D.), and the *Initial Decision*, 3 FCC Rcd 6710 (1988) (I.D.), of Administrative Law Judge Edward Luton (ALJ). Also before us are the Exceptions of G-A Communications, Inc. (G-A) to the S.I.D., a "Statement in Support" of the S.I.D. filed by Carmen Matias and Andrew N. Wimbish (Matias/Wimbish), and replies thereto filed by the Commission's Mass Media Bureau (Bureau) and Matias/Wimbish. All the remaining captioned parties filed Exceptions and appropriate replies to the I.D.

2. The proceeding below was ultimately heard on the following (renumbered) issues (I.D., at paras. 1-2, 5-6):

> 1. To determine whether the applications of G-A Communications, Inc. and Carmen Matias and Andrew N. Wimbish, Jointly are consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the Rule.
>
> 2. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> [3]. To determine whether Wood Broadcasting Company is financially qualified to construct and operate its

proposed television station in Conroe, Texas.

[4]. To determine whether G-A has failed to disclose a real party-in-interest to its application.

[5]. To determine the effect of the evidence adduced under [4] above on the basic qualifications of G-A to be a Commission licensee.

[6]. To determine the areas and populations which would receive television service of 64 dBu (Grade B) or greater intensity, together with the availability of other Grade B television services in such areas, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

[7]. To determine which of the proposals would, on a comparative basis, best serve the public interest.

[8]. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. Subsequent to our initial review of the record and the hearing of oral argument (on March 3, 1989), the Board was compelled to remand this proceeding on the following basic qualifications issue specified against G-A. *See Imagists*, 4 FCC Rcd 3749, 3752 (Rev. Bd. 1989):

[9]. To determine whether JoAnn Garcia lied to, misrepresented facts to, or lacked candor with the Commission in the Blanco, Texas comparative television (Channel 52) proceeding (MM Docket No. 85-269), *Opal Chadwell*, 1 FCC Rcd 120 (ALJ 1986) (*Initial Decision*,) 2 FCC Rcd 5502 (Rev. Bd. 1987), (*Decision*), *on review*, 65 RR 2d 1498 (1989); and, if so, the effect thereof on the basic qualifications of G-A Communications, Inc. to

be a Commission licensee.

4. In remanding this proceeding, the Board noted that the ALJ had resolved Issues [4] and [5], *supra*, in G-A's favor in the I.D. (at paras. 140-143). Nevertheless, we recounted that (4 FCC Rcd at 3749):

> [T]he real-party-in-interest issue herein had its genesis in the earlier proceeding of *Opal Chadwell*, 2 FCC Rcd 5502 (Rev. Bd. 1987), *remanded on other grounds*, 65 RR 2d 1498 (1989). There, applicant Dorothy O. Schulze and Deborah Brigham, A General Partnership (Schulze and Brigham) faced an issue to determine whether it misrepresented or had lacked candor in reporting the television broadcast applications of Schulze. In response to the specific allegation that Schulze had failed to report her ownership interest in the instant G-A application for Channel 55 in Conroe, Texas, Schulze and Brigham relied, in part, in the declaration of JoAnn Garcia, president and sole voting stockholder of G-A. Garcia testified in the *Opal Chadwell* proceeding that she did not previously know Schulze, and had never contemplated having her as a party to G-A's application. However, the ALJ in that proceeding disbelieved the testimony of both Schulze and Garcia, as well as that of Richard Ozan, the brother of both Schulze and G-A's purported sole non-voting (80% equity) stockholder, Elizabeth Anderson. Instead, the *Opal Chadwell* ALJ disqualified Schulze and Brigham for misrepresentation, finding (inter alia) that Ozan had filed a number of television applications -- including the instant G-A application -- using various females as false fronts. In reaching that determination, the *Opal Chadwell* ALJ specifically found that Garcia's testimony about her own participation in the instant G-A application was a "web of lies." *Opal Chadwell*, 1 FCC Rcd 120, 126 (ALJ 1986). Subsequently the Board affirmed the ALJ's disqualification of the Schulze and

> Brigham applicant, holding that the "case turns on the patently misleading testimony presented by Schulze . . . and Garcia concerning their purported extensive participation in the preparation and prosecution of the applications and the absence of any meaningful participation by Richard Ozan." *Opal Chadwell*, 2 FCC Rcd at 5509.

5. Before returning this proceeding to the ALJ, the Board requested the parties to file supplemental briefs addressing the question of the applicability of the doctrine of collateral estoppel to the real-party-in-interest issue. *See Memorandum Opinion and Order*, 4 FCC Rcd 2609 (Rev. Bd. 1989). The applicability of this doctrine was negatively resolved in our remand *Order*, 4 FCC Rcd at 3751, and we there further observed:

> Despite the established inapplicability of collateral estoppel here, we must now address the residual question of whether Garcia did, in fact, lie as a witness in the *Opal Chadwell* proceeding; and, if so, what effect such misrepresentation has upon G-A's basic qualifications to be a licensee. *See generally Character Policy Statement*, 102 FCC 2d 1179, 1188-1191, 1195-1196, 1210-1211, 1227-1229 (1986). In the Conroe I.D., paras. 107-125, 140-143, the ALJ reviewed the testimony of Garcia and former G-A counsel, Thomas L. Root. In essence, Garcia testified that she was the sole active "real party" behind G-A's application, and that Richard Ozan (brother of G-A's purported limited partner Elizabeth Anderson) had no role whatsoever in prosecuting the application. Root testified that he did not recall whether or not he had certain conversations with Garcia, Ozan, and Anderson, and he claimed he did not recall the content of those conversations and various other important matters concerning the application. The ALJ found Garcia's testimony "believable," and resolved the real-party-in-interest issue favorably to G-A. *Id.*, para.

143. Garcia's Conroe testimony was essentially replicative of the testimony she gave in the *Opal Chadwell* proceeding, which testimony was found in that *Initial Decision* to be a "web of lies," and wholly refuted by contrary testimony given by Root, Ozan, and Ron Baptist. *Opal Chadwell*, 1 FCC Rcd at 124-126. The Commission cannot blithely ignore an obvious negative "predicative judgment[ ] relating to an applicant's propensity to deal honestly with the Commission and to comply with our rules and policies." *Character Policy Statement*, 102 FCC 2d at 1232. Therefore, we shall remand this proceeding to the presiding ALJ on an issue to determine whether, in the *Opal Chadwell* proceeding, Ms. Garcia lied as a witness; and, if so, the effect thereof upon G-A's basic qualifications to be a licensee. Because, as noted above in paragraph 2, the *Opal Chadwell Decision* found that Richard Ozan ran an "application mill" of which the instant G-A application appeared to be a product, and the existence of the "mill" was reconfirmed at oral argument by G-A's current counsel, we invite the Commission's Mass Media Bureau to participate fully in the remanded proceeding in order to protect the integrity of the Commission's processes. *See generally Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301) (Gen. Docket No. 88-328), Report and Order*, FCC 89-110, released April 20, 1989; *Inquiry Into Alleged Abuses of the Commission's Processes*, 3 FCC Rcd 4740 (1988).

In his S.I.D., the ALJ resolved Issue [9] against G-A and found that applicant unqualified to be a Commission licensee. * * *

[material unrelated to the instant petition omitted]

IMAGISTS

38. Imagists is a purported Texas limited partnership. The "general partner" is Montgomery County Media Network, Inc. (Montgomery), a Texas corporation. The "limited partner" of Imagists is Humanity Interested Services, Inc. (HIS), a non-profit tax exempt Texas corporation. At the time of hearing, Montgomery stock was wholly owned by Dr. Rhonda Saldivar, President (50%), and Alan William Rossing, Vice President/Secretary (50%). Montgomery's total capital contribution requirement was $ 1,000, with $ 500 each to be provided by Saldivar and Rossing. However, none of these sums has been tendered. I.D., paras. 25-28.

39. The shares of profits or other income accruing to Imagists are proposed to be distributed as follows: Montgomery, 1%; HIS, 99%. I.D., para. 29.

40. Saldivar and Rossing both claim full-time 100% integration credit, and both seek preferences as minorities. Both are area or local residents. However, the ALJ ultimately determined that Imagists was a sham applicant, entitled to less than 1% ownership integration into management credit. [5] In so doing, he determined the following (to which Imagists, as will be discussed, *infra*, has generally *not* excepted) (I.D., paras. 151-156):

> The driving force and controlling principal behind Imagists is Charles Johnson, executive director of the limited partner, HIS. Charles Johnson is the minister of the Evangelistic Temple in Conroe, Texas. (Tr. 171). Under the name of Evangelistic Temple, Mr. Johnson was

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[5] On the "B cut-off" date, Montgomery had three shareholders (each purportedly owning a 1/3 interest): Saldivar, Rossing, and Frank Garza. Garza, originally proposed as President of Montgomery, resigned in December 1985. Thus, Saldivar and Rossing now each claim a 50% ownership interest.

the original petitioner to have Channel 55 allocated to Conroe. (Tr. 172). Without consulting either Saldivar or Rossing, Johnson decided that Imagists would be structured as a limited partnership. (Tr. 121). In the Articles of Incorporation filed for the general partner, Montgomery County Media Network, Charles Johnson was named as its sole director (Tr. 108), and is still identified as its resident agent. (Tr. 108). The address shown on Imagists' FCC application is "200 Avenue J, Conroe, Texas, 77301," which is the location of the offices of HIS. (Tr. 94). In Imagists' Certification of Limited Partnership, the address shown for the general partner is a post office box rented and used by HIS.

Charles Johnson's involvement in the prosecution of the Imagists application is to be contrasted with lack of involvement of Saldivar and Rossing. Both Rossing and Saldivar were invited to join the applicant after Imagists' structure had already been decided upon. Neither Rossing nor Saldivar took part in the preparation and filing of the application or in the hiring of Imagists' communications counsel, consulting engineers, or FAA consultant. (Tr. 92-3, 134-5). Rossing and Saldivar did not know one another prior to the filing of the application. (Tr. 127). Saldivar was invited to join by Charles Johnson's brother, also a director of HIS. (Tr. 89). Rossing was invited to join by Charles Johnson after Johnson learned that Rossing was an American Indian. (Tr. 165). Rossing agreed to help out in whatever way Johnson saw fit, although he had no idea of what his involvement might be and was not told that he would be involved in a managerial capacity at the station.

While Saldivar and Rossing have each served as secretary of Montgomery County Media Network, neither has prepared any minutes of its corporate meetings. (Tr. 97-8, 147). The minutes are prepared by the secretary for HIS.

(Tr. 97-8). The original minutes are retained by Charles Johnson. (Tr. 148-9). The positions Rossing and Saldivar are to have at the proposed station were decided upon in a conference phone call between Rossing, Saldivar, Charles Johnson and communications counsel. That decision was made in January 1986, a year and two months after the Imagists application was filed. Neither Saldivar nor Rossing played any part in securing FAA tower approval, which was handled by Charles Johnson's son, Dowen, the Assistant Executive Director for HIS. (Tr. 111).

Dr. Saldivar, president of the general partner, did not know what a public inspection file was (Tr. 101-2), did not know how many shares of stock she was entitled to (Tr. 108), and did not know whether money provided by HIS was to be considered a loan or a contribution to capital. (Tr. 113-4). Mr. Rossing did not know whether Imagists had a bank account (Tr. 152), did not know what the general partners' liability would be in a law suit (Tr. 158), and has never received correspondence directly from communications counsel. (Tr. 154).

Viewed collectively, the foregoing facts wholly undermine Imagists' representation that it has and will function as a *bona fide* limited partnership. Saldivar and Rossing have done nothing more than loan their names and minority status to Charles Johnson for his use in obtaining a television station. The contention that Saldivar and Rossing will have exclusive managerial control of the station while Charles Johnson assumes a non-participating role is not believed.

41. In its Exceptions, Imagists does not substantially contest any of the specific findings and conclusions of the ALJ. Instead, it merely argues that where there is a non-profit entity in a Commission application (here, HIS is purportedly an educational

institution), "the suppositions made in the business context are not applicable" for determining whether an applicant is a sham. Imagists also attempts to bolster its position by claiming that "Johnson would be a good applicant in his own right" and would be "100% locally owned with extensive civic and religious activities." Imagist Exceptions at p. 13. However, we note in passing that this argument ignores the fact that Johnson is already active in HIS (which operates a school in Conroe), and is its Executive Director. He is also Pastor of Evangelistic Temple of Conroe. I.D., para. 45. Further, no claim is made that if Johnson would have been the sole principal he would have sought full-time integration credit, or would have been entitled to a minority preference. Conversely, we believe that the ALJ's conclusion is directly on point: "Saldivar and Rossing have done nothing more than loan their names and minority status to Charles Johnson for his use in obtaining a television station." *See* para. 42, *supra*. Indeed, Dr. Saldivar did not know Johnson before being invited to participate in Imagists' application; and Rossing had not even spoken with Saldivar at the time the application was filed. I.D., paras. 33, 42.

42. We affirm the ALJ that Imagists is just another prototypical sham of the type found in such recent cases as *Evansville Skywave, Inc.*, 6 FCC Rcd 5373 (Rev. Bd. 1991). *See also Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *aff'd per judgment sub nom. South east Florida Broadcasting Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. October 28, 1991). As a result, Imagists is entitled to no integration credit whatsoever. *Royce International Broadcasting*, 6 FCC Rcd 2601 (1991).

CARMEN MATIAS and ANDREW N. WIMBISH

43. Section 73.610 (short-spacing) and air hazard issues (Issues 1 and 2) were designated against Matias/Wimbish. Subsequently, Matias/Wimbish submitted a petition for leave to specify a new,

properly spaced site that was different from the site originally specified in its application. In this amendment, Matias/Wimbish specified a tower height of 1150 feet. Matias/Wimbish indicated, in a supplement to the petition for leave to amend filed April 17, 1986, that another applicant herein (Wood) had proposed the same site, and that FAA approval had been issued to Wood. Matias/Wimbish indicated its belief that it, too, would soon obtain FAA approval (Tr. 390-391). This amendment was accepted at hearing; however, Matias/Wimbish subsequently learned that, in fact, Wood had never obtained FAA approval for its 1150 foot proposal; rather, a height reduction (to 750 feet) was required. (Tr. 293). Thus, this May 14, 1986 amendment to reduce the proposed tower height was rejected by the ALJ. *See Memorandum Opinion and Order*, FCC 86M-2184, released July 8, 1986. The ALJ, noting that the May 14, 1986, amendment was required because of "careless and erroneous reliance on what it unjustifiably believed to be the proposal of a competitor," ruled that Matias/Wimbish had failed to demonstrate good cause for acceptance of its amendment. As a result, in a further *Order*, FCC 86M-2183, released July 8, 1986, the ALJ also denied Matias/Wimbish's May 14, 1986 Motion for Partial Summary Decision (where Matias/Wimbish had sought summary decision of the short-spacing and air hazard issues). I.D., paras. 47-48.

44. Subsequently, however, the ALJ revisited his prior actions concerning the Matias/Wimbish tower site amendment, and in his I.D. (at paras. 130-131) specifically held:

> By its May 14, 1986 petition, Matias/Wimbish sought only to reduce its antenna height to obtain FAA approval, and it should have been permitted to do so. The petition was rejected because Matias/Wimbish's "significant carelessness" in proposing a 1,150 foot tower in the blind hope that the FAA would approve that height was inconsistent with the notion of unforeseeability. That analysis was in error. Matias/Wimbish's "carelessness" had nothing to do with its ability to anticipate the FAA's

later-expressed disinclination to approve a 1,150 foot tower. Nothing that Matias/Wimbish did, or failed to do, caused the FAA action to be foreseeable. Until the time of the FAA action, there was a reasonable possibility of FAA clearance (*Women's Broadcasting Coalition*, 59 RR 2d 730) and, consequently, no reason for Matias/Wimbish to have "foreseen" anything else.

Good cause is otherwise shown for Matias/Wimbish's May 14, 1986 amendment. The amendment: (a) is not voluntary in nature; (b) confers no comparative advantage; (c) does not prejudice any party; (d) does not disrupt the proceeding; (e) does not require the addition of issues or parties; and (f) was diligently filed.

Memorandum Opinion and Order, FCC 86M-2184 released July 8, 1986, is vacated; the Petition of Carmel Matias and Andrew N. Wimbish, Jointly, for Leave to Amend, filed May 14, 1986 is granted, and the amendment is accepted. *Order*, FCC 86M-2183, released July 8, 1986, is also vacated; the Motion for Leave to File Motion for Partial Summary Decision and Motion for Partial Summary Decision, both filed May 23, 1986 by Carmen Matias and Andrew N. Wimbish, Jointly, are granted, and the Section 73.610 issue designated against the applicant is resolved in its favor.

The presiding officer officially notices Aeronautical Study No. 86-ASW-0898-OE submitted as Appendix A to the Reply of Matias/Wimbish to Oppositions to Petition for Leave to Amend filed on June 3, 1986. Therein, the FAA approved Matias/Wimbish's transmitter site location and tower height at 750 feet above ground level. The air hazard issue designated against Matias/Wimbish is resolved in its favor.

45. All the remaining captioned parties except to the ALJ's resolution of this matter. However, we agree that, under the particular circumstances here present, the ALJ's analysis is correct. We agree that until the entire FAA process had run its course, there remained at least a "reasonable possibility" of final FAA determination of no hazard at the site. *See Women's Broadcasting Coalition, supra.* [6] Issues 1 and 2 are resolved in

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[6] In addition to its challenges concerning the ALJ's reconsideration of the Matias/Wimbish May 14 amendment, Imagists excepts to the ALJ's acceptance of their original April 17, 1986 amendment curing the short-spacing deficiency. It argues that the Commission was overly lenient in even accepting Matias/Wimbish's application; that, in comparable cases, the Commission has rejected short-spaced applications unaccompanied by waiver requests, citing *North Texas Media v. FCC*, 778 F.2d 28 (D.C. Cir. 1985); and, that the ALJ should also have rejected the amendment here. Without addressing Imagists' remarks concerning the Commission or HDO, *see generally, Frank H. Yemm*, 39 RR 2d 1657 (1977), Imagists' reliance on *North Texas Media* is misplaced. There, the court upheld a Commission order denying a waiver request of the minimum distance separation rules where a suitable non-short-spaced site was available. Here, in contrast, Matias/Wimbish never sought a waiver, nor was it aware that the site was short-spaced to the reference point for another assigned television channel. Its consulting engineer prepared the engineering portion of the application without indicating a short-spacing problem or other deviations from Commission requirements. Matias/Wimbish's Petition for Leave to Amend, filed April 14, 1986, at 1 Learning of the short-spacing allegation, Matias/Wimbish hired a new engineering firm. *Id.*, at 2. Wimbish, who is an African-American, determined that it would be prudent to have the engineering firm deal with the landowners in the rural Texas areas to obtain a new site. *Id.* However, he closely superintended their search for a site, contacting them twelve times by telephone and six times by letter. *Id.*, at 3. They spoke with at least six different landowners before securing the approval of two different landowners on adjoining parcels of property used for the site. Matias/Wimbish Supplement, filed April 17, 1986 (affidavit of consulting engineer). Matias/Wimbish's efforts are in direct contrast with those found in *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5193 (1991), where a failure to inquire about the status of a site was fatal to a good cause showing. *See also Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6320-6321 (Rev. Bd. 1990) (applicant diligent where time was necessary to negotiate even though efforts ultimately were unsuccessful). Imagists' exception is denied. As

favor of Matias/Wimbish.

46. With respect to the comparative aspects of Matias/Wimbish, the ALJ awarded 100% integration credit for both individual's promise to work full-time at the proposed facility. Their proposal was "substantially enhanced" by the minority status of both principals, and the fact that Matias is female. Wimbish lives in the proposed service area, and has been active in area civic activities; both Matias and Wimbish propose to move to Conroe. Wimbish also received a preference for past broadcast experience, and neither party has media interests. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

47. None of the captioned parties (save G-A) excepts to the ALJ's comparative evaluation of Matias/Wimbish. G-A argues that there was insufficient "documentation" of the partnership arrangement between the two principals and, as a result, Matias/Wimbish is entitled to no integration credit whatsoever. G-A Exceptions, pps. 17-22. In reply, Matias/Wimbish notes that (1) in its proposed findings of fact and conclusions of law filed with the ALJ on July 21, 1986, G-A averred that Matias/Wimbish

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for the May 14, 1986 amendment to reduce the proposed tower height to secure FAA clearance, the competing parties cannot seriously complain of the ALJ's ultimate action permitting the amendment. Arguably, Matias/Wimbish may have been slightly remiss in initially concluding that Wood's tower at a similar height and location had received FAA clearance, but the applicant quickly corrected its error less than 30 days after learning of its misunderstanding. Moreover, on July 10, 1986, two days after the original rejection of the May 14 amendment, the ALJ by *Order*, FCC 86M-2234 (as corrected), allowed Wood to amend its application to reduce its proposed tower height from 1145 feet to 745 feet. (G-A, too, was permitted to proffer its FAA clearance afterwards, i.e., on July 18, 1986. I.D., para. 144.) *Cuban-American Limited*, 5 FCC Rcd 3781, 3782 (1990), cited by G-A as support for rejection of Matias/Wimbish's amendment is inapposite. There, the Commission upheld an ALJ's discretion to establish a time limit for perfecting site proposals. Here, the ALJ was more lenient, and indeed permitted G-A to submit its FAA clearance even after the close of the record. These additional exceptions are denied.

"earn 100% full-time quantitative integration. Both partners have pledged to work at the station on a full-time basis. . . ."; (2) both principals testified at hearing that they each hold their respective interests and are each proportionately liable for all prosecution costs, and will share profits and losses accordingly, and partnership votes will be made on a 51%/49% basis. *See* Tr. 310-314, 341-342, 365-366, 369-370; (3) the principals have consistently reported to the Commission and the competing parties their structure and ownership interests; and (4) they intend to incorporate upon grant of the construction permit.

48. The ALJ also determined that there was a letter (dated February 18, 1985) from Matias to Wimbish stating that they are general partners, describes their respective shares, and expresses an agreement that both parties will leave current employment positions to devote full-time to the proposed station. *See* I.D., para. 49. This letter was not introduced into evidence, but was read into the record. *See* Tr. 311. At the same time at hearing, Matias confirmed that the principals had subsequently entered into a full partnership agreement dated February 18, 1985, and was executed by both Matias and Wimbish. *Id.* In light of the foregoing, G-A's exceptions will be denied.

CONCLUSIONS

49. Both Wood and G-A are disqualified. Imagists is a sham applicant, entitled to no integration credit whatsoever. As a result, the comparative coverage issue (Issue [6]) is of no moment with respect to G-A (and no new first service to a "white" area is proposed). As the only applicant entitled to any comparative preferences pursuant to the Commission's *Policy Statement*, Matias/Wimbish clearly prevails here and will be awarded the construction permit at contest.

50. ACCORDINGLY, IT IS ORDERED, That the applications of Montgomery County Media Network, Inc., et al., d/b/a Imagists (File No. BPCT-84129KF); Wood Broadcasting Company

(File No. BPCT-841129KW); and G-A Communications, Inc. (File No. BPCT-841129LE) ARE DENIED; and,

51. IT IS FURTHER ORDERED, That the application of Carmen Matias and Andrew N. Wimbish (File No. BPCT-841129KK) IS GRANTED. [7]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen

Member, Review Board

[7] The release of this document was delayed by the late reassignment to a different Board Member.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

DLBS INCORPORATED	File No. BPCT-840920KJ
Montgomery County Media Network, Inc. et al. d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY	File No. BPCT-841129KK
CONROE BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-841129KV
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G - A COMMUNICATIONS, INC.	File No. BPCT-841129LE

For Construction Permit
Conroe, Texas

Appearances

George R. Borsari, Jr., and *Howard W. Simocox, Jr.*, on behalf of DLBS Incorporated; *James L. Oyster*, on behalf of Montgomery County Media Network, Inc. et al, d/b/a Imagists; *Ann C. Farhat*0, on behalf of Carmen Matias and Andrew N. Wimbish, Jointly; *Richard J. Bodorff, David D. Oxenford, Janet M. Evans, Carroll John Yung*, and *Susan E. Borke*, on behalf of Conroe Broadcasting, Limited Partnership; *Howard G. Slavit*, and *Philip V. Jackmauh*, on behalf of Wood Broadcasting Company; and *Donald E. Martin*, on behalf of G-A Communications, Inc.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: November 8, 1988; Released: November 17, 1988

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications for a new television station in Conroe, Texas, filed by Conroe Broadcasting (Conroe), Wood Broadcasting Company (Wood), DLBS Incorporated (DLBS), Carmen Matias and Andrew N. Wimbish, Jointly (M&W), Montgomery County Media Network, Inc. *et al.* d/b/a Imagists (Imagists), and G-A Communications, Inc. (G-A). The *Designation Order*, MM-0791, released November 13, 1985, specified the following issues for hearing:

> 1. To determine whether the applications of G-A Communications, Inc. and Carmen Matias and Andrew N. Wimbish. Jointly are consistent with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the Rule.
>
> 2. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Memorandum Opinion & Order*, FCC 86M-1254

(released April 10, 1986), the following issue was added against Wood:

> To determine whether Wood Broadcasting Company is financially qualified to construct and operate its proposed television station in Conroe, Texas.

3. Issue 1 was resolved in G-A's favor pursuant to summary decision. *Order*, FCC 86M-1780 (released May 27, 1986). Issue 2 was resolved in favor of DLBS, Conroe Broadcasting, and Imagists pursuant to summary decision. *Order*, FCC 86M-1446 (released April 29, 1986) (DLBS): *Order*, FCC 86M-1257 (released April 10, 1986) (Conroe Broadcasting); *Order*, FCC 86M-798 (released March 3, 1986) (Imagists).

4. Hearing sessions were held during the period May 13-19, 1986. The record in this proceeding was closed on May 19, 1986. *Order*, FCC 86M-1781 (released May 27, 1986).

5. Subsequent to the filing of Proposed Findings of Fact and Conclusions of Law by the parties, the Presiding Judge designated additional issues to be tried in this proceeding. In response to a Motion to Enlarge Issued filed by Conroe Broadcasting, Limited Partnership, the Presiding Judge added the following issue by way of a *Memorandum Opinion and Order*, FCC 87M-344, released February 18, 1987:

> a) To determine whether G-A has failed to disclose a real party-in-interest to its application.
>
> b) To determine the effect of the evidence adduced under (a) above on the basic qualifications of G-A to be a Commission licensee.

6. By *Memorandum Opinion and Order*, FCC 87M-2010, released August 25, 1987, a comparative coverage issue was added:

To determine the areas and populations which would receive television service of 64 dBu (Grade B) or greater intensity, together with the availability of other Grade B television services in such areas, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. A hearing conference was convened on September 21, 1987. Further hearing sessions were conducted on December 1, 1987 and May 2, 1988. The record was closed on May 2, 1988. Tr. 1557; *Order*, FCC 88M-1398, released May 11, 1988.

II. FINDINGS OF FACT

* * *

[Material unrelated to the instant petition omitted]

B. Imagists

25. Montgomery County Media Network. Inc., *et al.*, d/b/a/ Imagists, is a Texas limited partnership. The general partner is Montgomery County Media Network, Inc. (Montgomery), a Texas corporation. Imagists Ex. 1, p. 1. It was stipulated at hearing that as of the B Cut-off date, Montgomery was structured as follows:

Name	Position	Ownership Interest
Frank Garza	President	33 1/3%
Dr. Rhonda Saldivar	Secretary	33 1/3%
Alan William Rossing	Vice President	33 1/3%

Tr. 84. Subsequent to the B Cut-off, Dr. Saldivar and Mr. Rossing each came to own a 50 percent share in Imagists. The minutes of Montgomery's Board of Directors meeting of

December 13, 1985 show that Imagists' President, Frank Garza, tendered his resignation. CBLP Ex. 2; Tr. 100. Dr. Saldivar assumed Mr. Garza's position as President, and Mr. Rossing assumed Dr. Saldivar's position as Secretary at the December 13, 1985 meeting. The resulting structure of Montgomery is as follows:

Name	Position	Ownership Interest
Dr. Rhonda Saldivar	President	50%
Alan William Rossing	Vice President Secretary	50%

Imagists Ex. 1. p. 1.

26. Montgomery's Articles of Incorporation were filed November 8, 1984. Wood Ex. 1A. Dr. Charles Johnson was Montgomery's initial Director, Wood Ex. 1A. p. 2; Tr. 108.

27. The limited partner of Imagists is Humanity Interested Services, Inc. (HIS), a non-profit tax exempt Texas corporation. Imagists Ex. 1, p. 1. HIS operates a school in Conroe, grades K-12. *Id.* Dr. Charles Johnson is Executive Director of HIS. Tr. 90-91. David Johnson is Secretary of HIS. Dowen Johnson is Vice President of HIS. Tr. 114. David and Charles Johnson are brothers. Dowen is a nephew of David Johnson. Tr. 115.

28. The capital contributions made to the partnership are as follows:

Name	Cash	Property
Montgomery	$ 1,000.00	-0-
HIS	-0-	$ 10,000.00

Conroe Ex. 3. Dr. Saldivar and Mr. Rossing testified that they are each obligated to contribute $ 500 which will comprise Montgomery's $ 1,000 capital contribution to the partnership. Neither Dr. Saldivar nor Mr. Rossing have actually paid any of this money thus far. Nor have they made contributions toward the costs of Imagists' application. Tr. 108, 140. Neither Mr. Rossing nor Dr. Saldivar has signed a stock subscription agreement. Tr. 109, 140-141.

29. The shares of profits or other income accruing to the partnership are as follows:

Name	**Share of Profits**
Montgomery	1%
HIS	99%

Conroe Ex. 4.

30. Dr. Rhonda Hill Saldivar proposes to serve as the full time (minimum 40 hours per week) Program Director of the station. Imagists Ex. 2, 1. Dr. Saldivar will be chairman of the program advisory committee, will interview prospective employees, and make recommendations to the General Manager regarding the hiring of staff. Dr. Saldivar is a black female.

31. Dr. Saldivar currently resides in Houston, Texas, within the Grade B contour of the proposed station. There is no record evidence which shows the length of that residence.

32. Dr. Saldivar has been employed at Texas Southern University as an Assistant Professor in the English Department. Imagists Ex. 2. Dr. Saldivar was a reference librarian at the Houston Public Library from 1984 to 1985. She was a freshman English instructor at Houston Community College from 1982 to 1983. She was an English teacher at Jersey Village High School in Jersey Village, Texas, from 1981 to 1982. Between 1979 and

1980, Dr. Saldivar taught English at Jarvis Christian College in Hawkins, Texas. Imagists Ex. 2, p. 3. Dr. Saldivar also taught English at Jarvis from June to August, 1977.

33. Dr. Saldivar testified that she became aware of the availability of a channel in Conroe through David Johnson, a member of HIS, while she was teaching at Southern Bible College. (January 1984 to May 1984). Tr. 86; Imagists Ex. 2. David Johnson invited Dr. Saldivar to become a member of HIS. Tr. 88. Through David Johnson, Dr. Saldivar became acquainted with Charles Johnson, Executive Director of HIS. Tr. 90-91. Following a telephone conference with David Johnson in which he asked Dr. Saldivar to participate in the Conroe application, members of HIS met with Dr. Saldivar to discuss the application. Tr. 89-90. At that first meeting, the relationship between HIS, Montgomery and Imagists was explained to Dr. Saldivar. Tr. 91. According to Dr. Saldivar, the idea to form a limited partnership was Dr. Charles Johnson's. Tr. 121. Dr. Saldivar had no role in preparing Imagists' application, and she does not know who did prepare that application (Tr. 92).

34. In its application, Imagists lists its address as "200 Avenue J, Conroe, Texas." HIS has offices at that address and operates the Christian Montessori School on that property. Tr. 93-94, 136.

35. The Certificate of Limited Partnership of Imagists lists its general partner, Montgomery, as having a principal place of business at P.O. Box 42, Conroe, Texas, 77305. Dr. Saldivar, the President of Montgomery, testified that P.O. Box 42 belongs jointly to Montgomery and NIS. Tr. 95. However, Dr. Saldivar does not have a key to that post office box. She testified that Charles Johnson has the key. Tr. 96.

36. Thus far, all of Imagists' legal and engineering fees have been paid by HIS (Tr. 112). Dr. Saldivar has not contributed

any money toward Imagists' application thus far. Tr. 108. She has not signed a stock subscription agreement. Tr. 109.

37. Alan William Rossing proposes to serve as full time (minimum 40 hours per week) General Manager/Sales Manager of the station. In this position he will be principally responsible for the day-to-day operation of the station and for management of the sales staff (Imagists Ex. 1). Mr. Rossing currently resides in Conroe, Texas, and has resided there since approximately 1984. Mr. Rossing is an American Indian (Imagists Ex. 1).

38. Mr. Rossing is currently employed by Atlas Single-Ply Inc., a commercial industrial roofing company. Tr. 154-155. Prior to his employment at Atlas and beginning in July 1985, Mr. Rossing worked for L & R Personnel, Inc., as an assistant manager, bartender, and waiter at the Tejas Cafe and Bar in Conroe. Imagists Ex. 1, p. 3. From April 1985 until his employment at Atlas, Mr. Rossing was the co-owner and operator of Curtsinger-Rossing, Inc. d/b/a/ "Old Conroe Deli and Catering." From September 1984 to March 1985, Mr. Rossing was the manager of Conroe City Gulf. He was employed by Ewing Tex Corporation, an industrial roofing company, from 1983 to 1984 as a general sales manager and supervisor. From 1982 to 1983, Mr. Rossing was the food and beverage directorat the Texas River Plantation Country Club in Conroe, Mr. Rossing has not claimed civic participation in Conroe.

39. In the Summer of 1984, Mr. Rossing became aware of the availability of a channel at Conroe through Charles Johnson. Tr. 132. Mr. Rossing testified that during their first conversation, Mr. Johnson asked him to be on the board of directors of an applicant for Conroe. *Id.*

40. Mr. Rossing was not involved in the selection of Imagists' communications counsel. Tr. 135. He testified that Frank Garza and Charles Johnson made that selection. To Mr.

Rossing's knowledge, Messrs. Johnson and Garza selected Imagists' engineer. He does not know who selected the applicant's FAA consultant.

41. According to Mr. Rossing, he first discussed the form of the applicant with Charles Johnson and Frank Garza in November 1984. Tr. 133-134. The idea for forming a limited partnership originated with Frank Garza and Charles Johnson. Tr. 134.

42. Mr. Rossing has never met Mr. Garza. Tr. 147. At the time Imagists' application was filed, Mr. Rossing had not spoken with Mr. Garza or Dr. Saldivar. Tr. 149. Dr. Saldivar and Mr. Rossing first met in December 1985, over a year after the application had been filed. Tr. 138. At the December 13, 1985 meeting, Mr. Rossing first learned from Charles Johnson that Mr. Garza had resigned. Tr. 1139, 156. Mr. Garza offered his resignation on August 31, 1985. Tr. 156-157, 164.

43. When Charles Johnson first approached Mr. Rossing about becoming a member of the applicant, there was no discussion of Mr. Rossing's future role at the proposed station. Mr. Rossing agreed to help out in whatever way Charles Johnson saw fit. Tr. 164. Mr. Rossing testified that either Charles Johnson or Frank Garza chose him as Vice President of Montgomery in the latter part of 1984. Tr. 159. Mr. Rossing did not learn that he was chosen for this position until the latter part of 1985, approximately a year after having been selected.

44. Mr. Rossing testified that all financial responsibilities of the partnership would be borne by HIS. Tr. 140. Mr. Rossing testified that Montgomery has no bank account and that he does not know whether Imagists has a bank account. Mr. Rossing has pledged $ 500 to Montgomery. He will be obligated to contribute the money if Imagists receives a grant of construction permit. Mr. Rossing has not contributed any money toward Imagists' application thus far. Tr. 140. Mr. Rossing does not

know the extent of Montgomery's potential liabilities. Tr. 158. To his knowledge, possible liabilities of Montgomery have not been discussed. Mr. Rossing testified that he does not know how any additional funding beyond HIS' initial $ 10,000 will be treated. Tr. 144-145. Mr. Rossing stated that an antenna site has been located; he does not know the location of the studio site. Tr. 145-146.

45. Mr. Charles Johnson testified that he is Pastor of Evangelistic Temple of Conroe. Tr. 171. He stated that one of the attorneys on the HIS Board of Directors drafted the Articles of Incorporation for Montgomery. Tr. 172.

46. Mr. Johnson has the key to P.O. Box 42 (actually 421) in Conroe. Tr. 176-177. Imagists' mail is delivered to 200 Avenue J. Conroe, Texas. Tr. 177. Mr. Johnson testified that whenever mail was of a nature that Imagists needed to receive, he would deliver it to Imagists. Tr. 178.

C. Matias and Wimbish

47. Section 73.610 (short-spacing) and air hazard issues were designated against Matias and Wimbish in the *Hearing Designation Order*. On April 14, 1988, Matias and Wimbish submitted a petition for leave to specify a new, properly spaced site. In this amendment, Matias and Wimbish specified a tower height of 1150 feet. Matias and Wimbish indicated, in a supplement to the petition for leave to amend filed April 17, 1986, that another applicant herein, Wood, had proposed the same site, and that FAA approval had been issued to Wood. Matias and Wimbish indicated its belief that it, too, would soon obtain FAA approval (Tr. 390-391). This amendment was accepted at hearing; however, Matias and Wimbish subsequently learned that in fact Wood had never obtained FAA approval for its 1150 foot proposal; rather, a substantial height reduction was required, as the proposed tower is in the flight path of an international airport (Tr. 293).

48. Matias and Wimbish's May 14, 1986, amendment, to lower the tower height, was rejected. *Memorandum Opinion and Order*, FCC 86M-2184 (released July 8, 1986). Noting that the May 14, 1986, amendment was required only because of "careless and erroneous reliance on what it unjustifiably believed to be the proposal of a competitor," it was ruled that Matias and Wimbish had failed to demonstrate good cause for acceptance of the amendment. In a further *Order*, FCC 86M-2183 (released July 8, 1986), the Presiding Judge denied Matias & Wimbish's May 14, 1986. Motion for Partial Summary Decision, where Matias & Wimbish had sought summary decision of the Section 77.610 (short-spacing) and air hazard issues.

49. Carmen Matias and Andrew N. Wimbish, Jointly, is a general partnership. Matias/Wimbish Ex. 1, p. 1: Tr.311. The partnership is structured as follows:

Name	Position	Ownership Interest
Carmen Matias	General Partner	51%
Andrew N. Wimbish	General Partner	49%

Matias/Wimbish Ex. 1. p. 1; Ex. 2, p. 1.

The only written understanding concerning the structure of the partnership is a February 18, 1985 letter from Ms. Matias to Mr. Wimbish. The letter states that the parties are general partners, describes their respective shares, and expresses an agreement that both parties will leave their present positions to devote their full time to the station if they are granted a construction permit. Tr. 311. This letter is the only formal documentation of the partnership's existence. Tr. 362.

50. Ms. Matias testified that her 51 percent share of the partnership entitles her to 51 percent of the responsibility in the station's operation. She also stated that profits would be

reinvested in the station for programming equipment and community programs. Tr. 314, 368-369. Further, some profits would be used to pay the partners' salaries. Tr. 369.

51. Ms. Matias and Mr. Wimbish testified that Matias and Wimbish intends to incorporate after Matias and Wimbish is granted a construction permit. Tr. 311-312, 376, 413-414. Beyond discussions of intent to incorporate, however, Matias and Wimbish has taken no steps to form a corporation. Tr. 313-315, 376.

52. Carmen Matias proposes to serve full time (a minimum of 40 hours per week) as the General Manager of Matias/Wimbish's proposed station. In that capacity she will direct and supervise the day-to-day operations of the station and its employees. In addition, Ms. Matias will implement and administer the station's equal employment opportunity program. Matias/Wimbish Ex. 1, pp. 3-4; Tr. 343.

53. Ms. Matias is an Hispanic female, born in San Juan, Puerto Rico. In 1976, she received a Bachelor of Arts degree in Communications from Hunter College of the City University of New York. Matias/Wimbish Ex. 1, pp. 1-2. Ms. Matias is currently employed as the Editorial Communications Manager for *The New York Daily News*, where her responsibilities include: the supervision of 12 promotion department copywriters and graphics personnel; promotion of the news editorial product, particularly via broadcast media; serving as media liaison, where Ms. Matias writes and arranges for the distribution of press releases publicizing editorial and corporate developments at the newspaper and is involved in the production of programming for internal use of the company; serving as liaison between the promotion/public relations departments with the newspaper's editorial department; and production of all internal communications and publications including NewsNotes (management letter) and NewsPix (employee news magazine) (since January 1985). Subsequent to January 29, 1986, Ms.

Matias has participated in production meetings concerning a seven-part series on the problems and issues related to mass transit to be aired by Channel 5 in New York City as part of a joint venture of Channel 5 and *The New York Daily News*. Id. at p. 2; Tr. 345-346. Upon the grant of the construction permit to Matias/Wimbish, Ms. Matias will terminate her present employment and relocate to Conroe, Texas. Matias/Wimbish Ex. 1, p. 4; Tr. 344-345.

54. From September 1982 to April 1983, Ms. Matias was the Producer of Station WOR-TV's (New York, New York -- now Secaucus, New Jersey) daily 60 minute public affairs program "Straight Talk." As Producer, Ms. Matias supervised a 12-person production staff, wrote on-air copy, developed and executed program ideas, was responsible for the operating budget, approved on-location remotes and selected programs for re-broadcast.

55. From March 1983 to May 1984, Ms. Matias was an independent freelance producer of a one--hour television pilot entitled "Women at Work, commissioned by Group W, New York, New York and aired over cable television. In that capacity, Ms. Matias wrote the script, hired the production personnel and supervised ten individuals.

56. From March 1980 to August 1982, Ms. Matias was the Assistant to the President and Liaison for broadcast production activities at Public Broadcasting Station WNET, Channel 13, New York, New York. In that capacity, Ms. Matias was involved in long-term corporate planning, national and metropolitan area programming, project development and underwriting for various programs, and was extensively involved in foreign co-productions and acquisitions. Ms. Matias also served as the management representative to the Corporation for Public Broadcasting (CPB) and Public Broadcasting Service (PBS).

57. From November 1976 to March 1980, Ms. Matias was employed by Station WNEW(TV), (now WNYW(TV)), Channel 5, New York, New York, beginning as a production assistant and working her way up to field producer and, ultimately, the associate producer of "Midday," a daily 90 minute public affairs program produced and aired by the station. Ms. Matias was responsible for the initiation and execution of program topics, the coordination of segments and shows, conducting preliminary guest interviews, writing on-air copy and the scheduling of crew calls.

58. Ms. Matias has been employed as media executive with Howard J. Rubenstein Associates, Inc., a New York City public relations firm where she was responsible for the placement of the firm's clients on media in the tri-state area, and on at least one occasion, assisted in the programming production of a segment featuring the firm's client on a program entitled "P.M. Magazine," which was produced and aired by Channel 5 in New York City (May 1984 to January 1985). Ms. Matias has also freelanced as a media specialist and marketing consultant for various New York City public relations firms where she was responsible for placing the firm's clients on television and in other media, and special events coordination (March 1983 - March 1984). Matias/Wimbish Ex. 1, pp. 2-3; Tro. 346-349.

59. Andrew N. Wimbish will be employed full time (a minimum of 40 hours per week) as Director of Finance and Administration at Matias/Wimbish's proposed station. In that capacity Mr. Wimbish will establish and implement the fiscal policies of the station and he will direct and supervise all aspects of the station's financial operations. Mr. Wimbish will report to Ms. Matias, the station's General Manager. Matias/Wimbish Ex. 2, pp. 4-5; Tr. 343-344; 396-397; 414-415.

60. Mr. Wimbish is a black American male, born in Pittsburgh, Pennsylvania. Since July 1980, Mr. Wimbish has

resided in Houston, Texas, within the proposes service area of Matias/Wimbish's station. In 1978, Mr. Wimbish received a Bachelor of Science degree in Accounting from Point Park College, Pittsburgh, Pennsylvania. Since August, 1985, Mr. Wimbish has been self-employed as a certified public accountant in Houston. Upon the grant of the construction permit to Matias/Wimbish, Mr. Wimbish will terminate his self-employment activities and relocate to Conroe, Texas. Matias/Wimbish Ex. 2, pp. 1-2, 5; Tr. 377-378, 394, 409.

61. Prior to August 1985 and for approximately nine years (since 1976), Mr. Wimbish was employed by Gulf Oil Corporation, Houston, Texas in various financial and financial management positions. Following the acquisition of Gulf by Chevron, Mr. Wimbish declined an employment opportunity with the merged company which would have required Mr. Wimbish and his family to relocate to San Francisco, Matias/Wimbish E. 2, p. 2; Tr. 377-378.

62. From 1982 until August 1985, Mr. Wimbish held the position of Supervisor of Management Reporting and Control for Gulf's International Trading and Marine Sales Division. In that position, Mr. Wimbish directly supervised five employees and was responsible for the review and consolidation of sales and earnings of subsidiaries for presentation to senior corporate management; establishing standards and controls for recording and reporting of company transactions and assets; and developing financial information for management in order to facilitate the monitoring and control of operations.

63. From 1980 to 1982, Mr. Wimbish held the position of Supervisor for Gulf's Control Unit, In Houston. In that capacity, Mr. Wimbish directly supervised four employees and directed, interpreted and coordinated work assignments in accounts receivables, general ledgers and data control.

64. From 1979 to 1980, Mr. Wimbish was a Senior

Accountant for Gulf in Pittsburgh, Pennsylvania, supervising six employees in the preparation of marine fuel billings to Gulf's customers worldwide. Mr. Wimbish's responsibilities also included the formulation and submission of year-end financial statements and tax receipts. From 1976 to 1979, Mr. Wimbish was a Junior Accountant for Gulf, also in Pittsburgh. From 1974 to 1976, he was employed as an accountant with Koppers Company, Inc., Pittsburgh, Pennsylvania, Matias/Wimbish Ex. 2, pp. 2-3; Tr. 377-378.

65. Mr. Wimbish has been active in the following civic and community activities in Houston, Texas, located within the proposed service area of Matias/Wimbish's station:

> Member, National Association of Black Accountants, Houston Chapter (1984 to present). Projects undertaken include free income tax return assistance to low income taxpayers (one hour per week during tax season); sponsoring of a Christmas party for disadvantaged children (one hour a week during Christmas); assistance with the Toys-for-Tots program.
>
> United Way Campaign -- solicited funds for years 1982 and 1983 (one hour each day during campaign period -- August to September).
>
> Member, Northglen Civic Association, Financial Committee -- the committee meets and discusses the financial development of the Northglen neighborhood of Houston (part of the northwest section of Houston where Mr. Wimbish resides) (one hour per week, 1986 to present).
>
> American Heart Association, Houston Chapter -- solicited funds during 1984 (one hour per week during campaign period -- approximately a one to two-month period).

Member, Progressive Missionary Baptist Church (1985 to present).

Subject to Mr. Wimbish's full time commitment to work at the proposed station, Mr. Wimbish will remain active in the National Association of Black Accountants and the Progressive Missionary Baptist Church and develop new civic and community interests in Conroe, devoting a minimum average of one to two hours each week to the foregoing activities. Matias/Wimbish Ex. 2, pp. 3-3; Tr. 393-394, 402-403.

* * *

[Material unrelated to the instant petition omitted]

Comparative Coverage Issue

126. Following are the total areas and populations which the applicants will cover with their respective Grade B contours:

	Grade B Area Sq. Mi.	Population
DBLS Incorporated (DBLS)	4,787	935,125
Imagists	8,381	2,730,210
Matias and Wimbish (M&W)	6,908	1,916,047
Conroe Broadcasting (Conroe)	7,106	2,449,297
Wood Broadcasting (Wood)	6,365	1,650,641
G-A	5,415	2,579,360

127. None of the applicants will provide a first service to any area. Following are the areas and populations to which the

applicants will provide a second through fifth service.

Applicant	2nd Service Area		3rd Service Area		4th Service Area		5th Service Area	
	Sq. Mi.	Pop.	Sq. Mi.	Pop.	Sq. Mi.	Pop.	Sq. Mi.	Pop.
DBLS	12	70	782	38,869	451	6,528	610	16,941
Imagists	83	4,215	1,592	126,769	777	31,820	730	19,916
M &W [1]	100	717	1,328	120,429	720	31,250	690	18,389
Conroe	43	314	1,066	97,601	617	20,969	712	19,374
Wood	75	586	1,166	117,995	640	29,463	640	17,389
G-A	0	0	45	24,853	272	4,585	583	16,397

III. CONCLUSIONS OF LAW

(a) Qualifying Issues

Matias and Wimbish

Section 73.610 Issue/Air Hazard Issue

128. On April 14, 1986, Matias/Wimbish filed an amendment to its application specifying a transmitter site in compliance with the minimum mileage separation requirements of Section 73.610 of the Commission's Rules. Matias/Wimbish was there proposing a tower height of 1,150 feet, and Federal Aviation Administration (FAA) approval for a tower of that height was made to appear to be routine. More specifically, Matias/Wimbish proposed to locate its tower close to that of Wood Broadcasting; it claimed to be proposing a tower approximately equal in height to that proposed by Wood, and Matias/Wimbish expressed its belief that the FAA had already issued a "no hazard determination respecting Wood's proposal. In light of all this, Matias/Wimbish concluded that FAA approval of its proposal "is expected within the next few

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[1] These figures for M&W do not take into account the fact that its antenna height has been substantially reduced.

weeks".

129. The Matias/Wimbish amendment was accepted as announced at hearing on may 13, 1986. Matias/Wimbish subsequently learned that it was mistaken in its belief that the FAA had approved a 1,150 foot tower height for Wood; in fact, Wood's approved tower height is approximately 754 feet. The FAA informed Matias/Wimbish that it would not approve a 1,150 foot tower, but that it will approve a tower approximately 740 feet in height. As a result, on May 14, 1986 Matias/Wimbish sought to amend its proposal to reduce its tower height to 750 feet. That Petition for Leave to Amend was denied and the amendment was not accepted (*Order*, FCC 86M-2184, released July 8, 1986). On May 23, 1986, Matias/Wimbish sought summary decision on the short-spacing issue. That motion was summarily denied (*Order*, FCC 86M-2183, released July 8, 1986.

130. By its May 14, 1986 petition, Matias/Wimbish sought only to reduce its antenna height to obtain FAA approval, and it should have been permitted to do so. The petition was rejected because Matias/Wimbish's "significant carelessness" in proposing a 1,150 foot tower in the blind hope that the FAA would approve that height was inconsistent with the notion of unforeseeability. That analysis was in error. Matias/Wimbish's "carelessness had nothing to do with its ability to anticipate the FAA's later-expressed disinclination to approve a 1,150 foot tower. Nothing that Matias/Wimbish did, or failed to do, caused the FAA action to be foreseeable. Until the time of the FAA action, there was a reasonable possibility of FAA clearance (*Women's Broadcasting Coalition*, 59 RR 2d 730) and, consequently, no reason for Matias/Wimbish to have "foreseen" anything else.

131. Good cause is otherwise shown for Matias/Wimbish's May 14, 1986 amendment. The amendment: (a) is not voluntary in nature; (b) confers no comparative advantage: (c) does not

prejudice any party; (d) does not disrupt the proceeding; (e) does not require the addition of issues or parties; and (f) was diligently filed.

132. *Memorandum Opinion and Order*, FCC 86M-2184 released July 8, 1986, is vacated; the Petition of Carmen Matias and Andrew N. Wimbish, Jointly, for Leave to Amend, filed May 14, 1986 is granted, and the amendment is accepted. *ORDER*, FCC 86M-2183, released July 8, 1986, is also vacated; the Motion for Leave to File Motion for Partial Summary Decision and Motion for Partial Summary Decision, both filed May 23, 1986 by Carmen Matias and Andrew N. Wimbish, Jointly, are granted, and the Section 73,610 issue designated against the applicant is resolved in its favor.

133. The presiding officer officially notices Aeronautical Study No. 86-ASW-0898-OE submitted as Appendix A to the Reply of Matias/Wimbish to Oppositions to Petition for Leave to Amend filed on June 3, 1986. Therein, the FAA approved Matias/Wimbish's transmitter site location and tower height at 750 feet above ground level. The air hazard issue designated against Matias/Wimbish is resolved in its favor.

* * *

[Material unrelated to the instant petition omitted]

(b) Standard Comparative Issue

Comparative Coverage

145. In terms of overall areas and population served, Imagists has an advantage over each of the other applicants. This advantage ranges from marginal, vis-a-vis Conroe and G-A, to moderate, vis-a-vis M&W and Wood, to substantial vis-a-vis

DLBS. Moreover, while each of the applicants, with the exception of G-A, would provide some second service, Imagist's second service to 4,215 persons is substantially greater than the 717 person which would receive a second service from the second place applicant, M&W. Imagists also leads each of the other applicants in the provision of third, fourth and fifth services, albeit by relatively small margins. Imagists is entitled to a slight advantage for total coverage over DLBS and Wood. In each case Imagists serves a significantly larger population. Similarly, Conroe, M&W and G-A, which will each provide Grade B service to twice as many people as DLBS, deserve a slight comparative advantage over DLBS. *See Simon Geller*, 90 FCC 2d 250, 268-9, 276 (1982). The largest preferences, however, are traditionally awarded for provision of new first or second (first competitive) service. In this regard, Imagist is entitled to a moderate advantage over each of its competitors for its provision of service to a larger total population and for its provision of a first competitive service to a more significant population. *Christian Broadcasting of Midlands, Inc.*, 99 FCC 2d 478, 582-83 (Rev. Bd. 1984).

DLBS

146. DLBS is entitled to 100% quantitative integration credit for its proposal to integrate its three principals in management positions on a full-time basis. The integration proposal is enhanced to a minor degree by the broadcast experience of the three principals. Slight enhancement is awarded for the proposal of one of DLBS's principals, 1/3 owner Dr. Schwarzwalder, to establish future residence in Conroe, Texas.

147. Dr. Schwarzwalder is one of 23 directors of Capital Broadcasting Association, licensee of non-commercial station KMFA(FM), Austin, Texas. As such, he has some involvement in the making of policy for the station and in its management. A slight diversification demerit will be assessed. *San Joaquin Television Improvement Corp.*, 54 RR 2d 1206.

Imagists

148. Were Imagists a bona fide limited partnership, it would be entitled to an overall quantitative credit of 66 2/3%, based on the full-time participation of its two remaining integrated principals. However, the record in this proceeding clearly establishes that *defacto* control over the applicant rests with the limited partners. Thus, the integration credit due Imagists must be reduced to 2/3% to reflect the 99% ownership of the unintegrated limited partner.

149. When Imagists filed its application, its general partner, Montgomery County Media Network, was owned in equal share by Frank Garza, Alan Rossing, and Rhonda Saldivar. This structure was still in place as of the "B" cut-off date, January 16, 1985. On August 31, 1985, Frank Garza resigned as a principal of Montgomery County Media Network and surrendered his ownership interest. That resignation was reflected in an Imagists' amendment filed on December 30, 1985.

150. Under longstanding Commission case law, "an applicant will not be permitted to retain a comparative advantage if a principal voluntarily withdraws after the time for amending as a matter of right has expired." *Las Misiones De Bejar Television Co.*, 53 RR 2d 119, 123 (Rev. Bd. 1983). In this proceeding, Mr. Garza's resignation, due to personal and work problems (Tr. 157) must be considered as a "voluntary withdrawal." Thus, Mr. Garza's resignation caused a 33 1/3% diminution in Imagists' integration proposal. This diminution cannot be cured by the post-designation increase in ownership of Rhonda Saldivar and Alan Rossing. *Barton Broadcasting Co.*, FCC 86R-31, released May 15, 1986, *Central Texas Broadcasting Co. Ltd.*, 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982). Since Frank Garza's resignation must be held against imagists, the maximum quantitative integration credit available under normal circumstances would be 66 2/3% for the full-time

participation of Saldivar and Rossing.

151. The driving force and controlling principal behind Imagists is Charles Johnson, executive director of the limited partner, HIS. Charles Johnson is the minister of the Evangelistic Temple in Conroe, Texas. (Tr. 171). Under the name of Evangelistic Temple, Mr. Johnson was the original petitioner to have Channel 55 allocated to Conroe. (Tr. 172). Without consulting either Saldivar or Rossing, Johnson decided that Imagists would be structured as a limited partnership. (Tr. 121). In the Articles of Incorporation filed for the general partner, Montgomery County Media Network, Charles Johnson was named as its sole director (Tr. 108), and is still identified as its resident agent. (Tr. 108). The address shown on Imagists' FCC application is "200 Avenue J, Conroe, Texas. 77301," which is the location of the offices of HIS (Tr. 94). In Imagists' Certification of Limited Partnership, the address shown for the general partner is a post office box rented and used by HIS. (Tr. 95). While Charles Johnson has key to the mailbox, no member of the general partner does. (Tr. 95, 137, 177). Mail received at the post office box is brought to the offices of HIS, where it is opened and reviewed by Charles Johnson or the secretary for HIS. (Tr., 177-78). The public inspection file is kept at the offices of HIS and is maintained by Charles Johnson. (Tr. 141). Mr. Johnson attended all formal meetings of the general partner (Tr. 147-8) and participated in the decision to make Rhonda Saldivar its president. (Tr. 149).

152. Charles Johnson's involvement in the prosecution of the Imagists application is to be contrasted with lack of involvement of Saldivar and Rossing. Both Rossing and Saldivar were invited to join the applicant after Imagists' structure had already been decided upon. Neither Rossing nor Saldivar took part in the preparation and filing of the application or in the hiring of Imagists' communications counsel, consulting engineers, or FAA consultant. (Tr. 92-3, 134-5). Rossing and Saldivar did not know one another prior to the filing of the application. (Tr.

127). Saldivar was invited to join by Charles Johnson's brother, also a director of HIS. (Tr. 89). Rossing was invited to join by Charles Johnson after Johnson learned that Rossing was an American Indian. (Tr. 165). Rossing agreed to help out in whatever way Johnson saw fit, although he had no idea of what his involvement might be and was not told that he would be involved in a managerial capacity at the station.

153. While Saldivar and Rossing have each served as secretary of Montgomery County Media Network, neither has prepared any minutes of its corporate meetings. (Tr. 97-8, 147). The minutes are prepared by the secretary for HIS. (Tr. 97-8). The original minutes are retained by Charles Johnson. (Tr. 148-9). The positions Rossing and Saldivar are to have at the proposed station were decided upon in a conference phone call between Rossing, Saldivar, Charles Johnson and communications counsel. That decision was made in January 1986, a year and two months after the Imagists application was filed. Neither Saldivar nor Rossing played any part in securing FAA tower approval, which was handled by Charles Johnson's son, Dowen, the Assistant Executive Director for HIS. (Tr. 111).

154. Dr. Saldivar, president of the general partner, did not know what a public inspection file was (Tr. 101-2), did not know how many shares of stock she was entitled to (Tr. 108), and did not know whether money provided by HIS was to be considered a loan or a contribution to capital. (Tr. 113-4).

155. Mr. Rossing did not know whether Imagists had a bank account (Tr. 152), did not know what the general partners' liability would be in a law suit (Tr. 158), and has never received correspondence directly from communications counsel. (Tr. 154).

156. Viewed collectively, the foregoing facts wholly undermine Imagists' representation that it has and will function

as a bona fide limited partnership. Saldivar and Rossing have done nothing more than loan their names and minority status to Charles Johnson for his use in obtaining a television station. The contention that Saldivar and Rossing will have exclusive managerial control of the station while Charles Johnson assumes a non-participating role is not believed. "The facts of record overwhelmingly show that [Charles Johnson] has been the dominant individual in [Imagists] up to the present, and there is nothing to suggest that he will suddenly become uncharacteristically inert in the future, other than bald assertions". *Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293, 59 RR 2d 761, (Rev. Bd. 1985).

157. Ultimately, the limited partnership structure of Imagists must be disregarded, and the 99% unintegrated ownership of HIS must be attributed to the applicant for comparative purposes. *NEO Broadcasting Co.*, 60 RR 2d 125 (Rev. Bd. 1986). Since the only two integrated principals of Imagists together own a mere two-thirds of 1 percent, Imagists is only entitled to 2/3% integration credit. The integration proposal is enhanced by Dr. Saldivar's minority status, the fact that she is a female, and by the fact of her residence in Houston, Texas, within the Grade B contour of the proposed station. Additionally, enhancement is awarded for the minority status of Mr. Rossing, and for his local residence.

158. Neither Imagists nor any of its principals has any other media interests, and receives no diversification demerit.

Matias and Wimbish

159. Matias/Wimbish is entitled to 100% quantitative integration credit for the proposal to integrate Ms. Matias and Mr. Wimbish into the management of the station on a full-time basis. The proposal is substantially enhanced by the minority status of both Ms. Matias and Mr. Wimbish. Substantial

enhancement is also awarded by virtue of Ms. Matias' status as a female. Additional enhancement of the integration proposal derives from the fact that Mr. Wimbish is presently a resident of Houston, Texas, within the proposed service area, and both he and Ms. Matias propose Conroe, Texas, as their residence in the event of a grant. Finally, the integration proposal is enhanced by Mr. Wimbish's participation in civic activities within the proposed service area, and also by Ms. Matias' broadcast experience.

160. Matias/Wimbish and its individual general partners have no media interests and, therefore, receive no diversification demerit.

Conroe Broadcasting

161. Conroe Broadcasting receives 100% quantitative integration credit for the full-time integration of its general partner, Mr. Roosevelt Moore, as its Director of Public Affairs and Religious Programming. That proposal is substantially enhanced by Mr. Moore's minority status. Slight enhancement is awarded for Mr. Moore's proposal to establish future residence in Conroe, Texas, and his broadcast experience enhances the integration proposal to a minor degree.

162. Conroe Broadcasting has no media interest which are to be attributed to it in a diversification analysis.

Wood Broadcasting

163. Dr. Wood, a one-third owner who had been proposed as Wood Broadcasting Company's general manager, died on December 3, 1987. The fact of Dr. Wood's death was reported by amendment filed January 27, 1988.

164. Even though Commission precedent permits an applicant to substitute another principal for a deceased principal who had

been proposed as an integrated owner and to maintain, but not increase, its quantitative integration credit (*Rose Broadcasting Co.*, 68 FCC 2d 1242, 1248-50), Wood has made no such substitution on this record. Wood's quantitative integration credit is reduced to 66 2/3%.

165. The proposal is enhanced by Mrs. Wood's service area residency, her civic activities there, and by her minority and female status. The proposal is also enhanced by Gina Wood's proposed and service area residency, her minority and female status and, very slightly, by her broadcast experience.

166. Wood receives no diversification demerit.

G-A Communications

167. G-A's application was filed in November 1984, at a time when Jo Ann Garcia was its sole principal. The B cut-off date in this proceeding was January 16, 1985. G-A was incorporated in the Commonwealth of Virginia in December 1985. Ms. Garcia received her stock in December 1985. Integration statements were filed on January 29, 1986. Elizabeth Anderson received her stock in March 1986. The fact that G-A was not incorporated until after the B cut-off date does not affect G-A's entitlement to 100% quantitative integration credit for the participation of Ms. Garcia.

168. From the inception of the application until March 17, 1986, when Ms. Anderson acquired her non-voting stock, G-A had only one principal -- Ms. Garcia. She was the only principal named in the application and she remained alone through the time of incorporation. When G-A was incorporated in December 1985 she was still the sole principal of the applicant, owning 100% of the outstanding stock. Thus, her status as the sole principal remained unchanged from the time the application was filed, through the B cut-off date, and through the time of incorporation. Unlike the situations in

Pacific Television, Ltd., 2 FCC Rcd 1101 (Rev. Bd. 1987), and *Hispanic Owners, Inc.*, 57 RR 2d 695 (Rev. Bd. 1985), there was only one G-A principal and her status remained constant at all critical times.

169. G-A's 100% quantitative integration credit is enhanced substantially by Ms. Garcia's status as a member of a racial minority and her status as a female. The proposal is also moderately enhanced by Ms. Garcia's service area residence and her participation in civic activities there.

170. G-A receives no diversification demerit.

Ultimate Conclusions

171. Wood Broadcasting Company is financially unqualified. The quantitative integration credit awarded to Imagists is sufficiently low to remove it from further consideration. DLBS (with its 100% quantitative integration, enhanced slightly by the broadcast experience of its principals, and only very slightly by the proposed local residence of one of its 1/3 owners) suffers a slight diversification demerit and can not prevail over any of the three remaining applicants. Conroe Broadcasting, with its 100% quantitative integration, substantially enhanced by its 100% minority participation but enhanced only slightly by its promise of local residence and broadcast experience, trials both Matias/Wimbish (100% quantitative integration, 100 substantial enhancement for minority status, 50% substantial enhancement for female status, 50% moderate enhancement for service area residency, 100% slight enhancement for promised local residency, 50% slight enhancement for service area civil activities, and 50% slight enhancement for service area civil activities, and 50% slight enhancement for broadcast experience), and G-A Communications (100% quantitative integration, with 100% substantial enhancement for minority status, 100% substantial enhancement for female status, 100% moderate enhancement for service area civic activities). The

enhancement awarded to Matias/Wimbish slightly outweigh those awarded to G-A, making Matias/Wimbish the preferred applicant in this proceeding.

Accordingly, IT IS ORDERED that the applications of DLBS Incorporated, Montgomery County Media Network, Inc. *et al.* d/b/a Imagists, Conroe Broadcasting Limited Partnership, Wood Broadcasting Company, and G-A Communications, Inc., ARE DENIED, and the application of Carmen Matias and Andrew N. Wimbish, Jointly, IS GRANTED. [2]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton

Administrative Law Judge

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[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[6 FCC Rcd 1602] FCC 91-68

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-424

In re Applications of

ASPEN FM, INC. File No. BPH-850712PH
AJAX MOUNTAIN
BROADCASTING CORPORATION File No. BPH-850712PR

For Construction Permit for
New FM Station, Channel 296A,
Aspen, Colorado

ORDER

Adopted: March 11, 1991; Released: March 21, 1991
As Corrected by Erratum, DA 91-1023, August 20, 1991

By the Commission

1. Before the Commission is an Application for Review filed June 25, 1990, by Ajax Mountain Broadcasting Corporation (Ajax), and an Opposition and Errata filed July 10 and 11, 1990, by Aspen FM, Inc. (Aspen). These pleadings relate to a Review Board decision, *Aspen FM, Inc.*, 5 FCC Rcd 3196 (1990), which granted Aspen's application and denied Ajax's application on the basis that it was not financially qualified. For the reasons that follow, we reject Ajax's arguments that the Board erred in holding that it was financially unqualified.

2. Sue Ann Todhunter, Ajax's president/treasurer and majority voting stockholder, certified Ajax's financial

qualifications in its application filed July 12, 1985. Todhunter claimed that Steven P. Hubert, Ajax's financial backer and majority non-voting stockholder, had agreed to provide all the funds Ajax needed to prosecute its application, construct the station, and operate it for three months without revenue, and that a loan agreement had been executed by her and Hubert on July 9, 1985 (Aspen FM Ex. 30). 5 FCC Rcd 3196, 3197 ¶¶ 6-7.

3. The Board found, however, that the loan agreement did not commit Hubert to provide the entire amount ($ 475,343) Ajax needed to construct and operate the station because of the funding conditions specified therein, which provided that Hubert was to fund Ajax in four distinct and specific phases, and he had to expressly approve continuing to each phase of Ajax's project before the funds needed for the next phase would be provided. [1] The Board also found that Hubert never made available to Todhunter a balance sheet or financial statement establishing his ready liquidity. He did, however, inform Todhunter at the time the agreement was executed that he intended to use his lines of credit with the Maryland National Bank to meet his loan commitment to Ajax, and that Todhunter could check with the bank to verify those lines of credit (Tr. 3292-3298). Todhunter did not attempt to confirm Hubert's lines of credit (Tr. 3004-3006). When the records of the Maryland National Bank became available, the Board found that they showed that Hubert's 1985 lines of credit could only be used for real estate investments, and Hubert did

[1] Phase I funding was limited to $ 18,000, which was to be used solely for prosecuting Ajax's application through acceptance for filing by the Commission; Phase II funding was an additional $ 65,000, which was to be used solely for prosecuting the application through the comparative proceeding; Phase III funding was an additional $ 250,000, which was to be used solely for constructing the station and start-up operations; and Phase IV funding was an additional $ 350,000, which was to be used solely for the continued operation of the station.

not seek the bank's approval to use them to invest in Ajax until 1988. 5 FCC Rcd at 3197 ¶¶ 6-10.

4. Based on the foregoing, the Board found that, when Todhunter certified Ajax's financial qualifications, she did not have reasonable assurance of committed loan funds from Hubert to construct and operate Ajax's station for three months without revenue, nor did she have reasonable assurance of Hubert's ready liquidity to meet his loan commitment to Ajax. Accordingly, the Board concluded that Ajax was not financially qualified when it filed its application and denied its application on that basis. 5 FCC Rcd at 3199 ¶¶ 17-20.

5. Ajax argues in its application for review that it demonstrated at hearing, consistent with *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), that it had reasonable assurance of committed loan funds from Hubert when it filed its application, based on Hubert's hearing testimony that he intended to fund Ajax's project through its completion, and on Todhunter's hearing testimony that she believed that Hubert intended to provide all the funds Ajax needed. According to Ajax, the Commission in *Northampton* indicated that, when a financial qualifications issue is specified against an applicant which has certified its financial qualifications, the applicant can adduce evidence at hearing to demonstrate that it had reasonable assurance of financing at the time of certification. Ajax contends that it did precisely that based on the above testimony of its witnesses, and that the Board erred in failing to accept its showing.

6. We find no merit to Ajax's argument, inasmuch as it is based on an erroneous interpretation of the Commission's holding in *Northampton*. While the Commission did indicate there that an applicant, which certified its financial qualifications, could show at hearing that it had reasonable assurance of committed loan funds when it filed its application, it further explained that *the applicant must adduce probative*

evidence to do this. Applying the foregoing probative evidence test to the evidentiary showings submitted by Ajax to establish that it had reasonable assurance of committed loan funds from Hubert in 1985, the Board properly concluded that Ajax's pre-certification loan agreement, which by its express terms demonstrated that Hubert was not obligated to provide all of the funds Ajax needed to construct and operate the station, was more probative and entitled to more evidentiary weight than the self-serving testimony of Ajax's witnesses years later at the hearing. The Board thus correctly concluded that Ajax failed to establish that it had reasonable assurance of committed loan funds at the time of certification. Based on our review, we find that the Board's determination is based on substantial record evidence and reject Ajax's contention that the Board's evaluation of the evidence was either arbitrary and capricious or inconsistent with the Commission's pronouncements in *Northampton*.

7. Ajax's further contention that it showed at hearing that Hubert had sufficient liquid assets to meet his loan commitment to Ajax at the time it filed its application is similarly flawed. Its reliance on the testimony of an official of the Maryland National Bank, who stated that he knew of no reason why the bank would not have removed the restrictions on Hubert's lines of credit had he requested their removal in 1985, is unavailing. As the Board aptly pointed out, the records of the bank contemporaneous with the certification showed otherwise, and that documentary evidence is more probative and entitled to more evidentiary weight than the subjective testimony of Ajax's witness.

8. Furthermore, as mentioned, Todhunter had not seen a 1985 balance sheet or financial statement evidencing Hubert's financial ability to meet his loan commitment to Ajax when she certified the application; nor had she taken steps to verify the existence of Hubert's 1985 lines of credit. *See* paragraph 3, *supra*. Indeed, the most Todhunter knew of Hubert's financial

wherewithall at that time was based on second-hand information derived from Yvonne Schell, who recruited Hubert as an Ajax investor, acted as his go-between in most of Todhunter's prior dealings with him, and informed Todhunter that, based on her analysis of a copy of Hubert's financial statement, he was financially capable of financing Ajax's entire project (Tr. 2930). However, as the Commission indicated in *Northampton*, the applicant must demonstrate that it has taken the necessary steps to ascertain that the lender, when not a financial institution, has sufficient financial resources to meet his loan commitment at the time of certification, and that reliance on the self-serving statement of the indivdual responsible for the certification that he took the appropriate steps to secure the needed funds would not be sufficient to demonstrate that it met its burden in this respect. [2] For this additional reason, we find that Ajax failed to demonstrate that it had reasonable assurance of committed loan funds at the time of certification.

9. In view of the above, and having reviewed the Board's decision in conjunction with other pertinent evidence compiled in this respect, we agree that the financial qualifications issue specified against Ajax must be resolved against it, and that its application must be denied for its failure to demonstrate that it possessed the requisite qualifications to be a licensee when it filed its application. The Commission has long-held that the applicant has the burden of demonstrating that it possesses the qualifications to be a Commission licensee pursuant to 47 U.S.C. § 308(b). *See, e.g., Midwest Radio-Television, Inc.*, 24 FCC 2d 625, 626 ¶ 4 (1970).

10. A further matter warrants brief discussion. In the *Initial*

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[2] In *Northampton*, the individual certifying the application had personal knowledge of the lender's financial worth (4 FCC Rcd at 5518 ¶¶ 7-8), whereas here Todhunter had never met Hubert prior to their execution of the loan agreement and relied solely on second-hand information as to his financial ability to meet his loan commitment to Ajax.

Decision, 4 FCC Rcd 4642 (1989), the Administrative Law Judge (ALJ) resolved in Ajax's favor the financial qualifications issue specified against it. [3] In so doing, the ALJ reasoned that, because a financial issue looks forward, he could analyze Ajax's more recent 1988 financial proposal to determine whether it is financially qualified to be a licensee. [4] *Id.* at ¶ 6. Based on his analysis of that financial proposal, the ALJ found that Ajax was financially qualified (*id.* at ¶ 7-10) and resolved the financial qualifications issue favorably to Ajax. *Id.* at 4648 ¶ 4.

11. In its decision, the Board held that the ALJ's rationale that a financial issue is forward looking and does not depend on the applicant's financial condition at the time of certification was plain legal error. 5 Rcd at 3198 ¶ 15. For the reasons that follow, we hold that the ALJ not only erred in that respect, but also erred in accepting Ajax's new financial proposal into evidence in the absence of a petition to amend filed pursuant to 47 C.F.R. §73.3522(b) demonstrating the type of good cause showing required as discussed in paragraphs 12 and 13, *infra*. For those same reasons, we reject Ajax's arguments that the ALJ correctly held that it was financially qualified.

12. Prior to 1981, before the Commission adopted its (now-abandoned) certification procedures, 50 RR 2d 381

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[3] The ALJ denied Ajax's application based on misrepresentations, including knowingly misrepresenting its financial qualifications at the time of certification, under a misrepresentation/false financial certification issue that was also specified against it. The Board did not reach, nor have we, the ALJ's determination that Ajax should be disqualified under that issue, or Ajax's exceptions that the record reflects no intent to deceive.

[4] Aware that its financial qualifications were being challenged as a result of the ALJ adding issues against it, Ajax amended its 1985 loan agreement to remove the conditional funding provisions specified therein, and Hubert also took steps to have the bank remove the real estate restrictions on his lines of credit. Ajax then proffered at the hearing its new 1988 financial proposal, and the ALJ accepted it into evidence.

(1981), the Commission generally followed a liberal amendment policy in mutually exclusive broadcast cases, which permitted applicants to remove fatal deficiencies in their financial proposals. [5] At that time, applicants could amend the financial proposals during the hearing in response to financial issues specified against them. However, applicants were then also required to include a fairly detailed financial proposal as part of their applications. This practice changed with the adoption of the certification procedures. Under our certification procedures, applicants were no longer required to submit any financial information with the application. This approach, the Commission realized, was subject to serious abuse, with applicants having the opportunity to certify their financial qualifications without any basis or justification and then to formulate a financial proposal later. *In the Matter of Certification of Financial Qualifications*, 2 FCC Rcd 2122 (1987). To prevent this, the Commission's focus shifted in cases where there was a good cause question concerning a revised proposal, to first determining the validity and substance of the applicant's original financial proposal at the time of certification in passing on petitions proposing subsequent financial amendments. Moreover, as mentioned (n.5, *supra*), the Commission has also determined that its former liberal amendment policy was inconsistent with its objective of stabilizing applicants' proposals at the beginning of the proceeding and that that policy had disrupted and delayed hearing proceedings in conflict with the goal of expeditiously providing new services to the public which the Commission sought to achieve in its *Revised Procedures for the Processing*

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[5] The Commission then sought the broadest choice among applicants in order to obtain the optimum in ultimate service to the public. More recently, the Commission has determined that that policy often disserved the public interest by inordinately delaying new service to the public. *See, e.g., Cuban-American Limited*, 5 FCC Rcd 3781, 3782 ¶ 5 (1990), *recon. denied*, FCC Rcd (1990), and *Chudy Broadcasting Corp* 58 RR 2d 133, 134 n.7 (1985).

of Contested Broadcast Applications, 72 FCC 2d 202 (1979). *See also, e.g., Report and Order*, 58 RR 2d 776 (1985), establishing the Commission's "hard look" approach for handling FM applications, and its institution in some services of entirely new procedures (lotteries) for awarding licenses. 53 RR 2d 1401 (1983).

13. Thus, initial financial qualifications have become a critical ingredient in a good cause showing for such amendments and, in the absence of a demonstration by the applicant that it had reasonable assurance of financing at the time of certification, subsequent petitions to amend financial proposals have been disallowed. [6] *See, e.g., Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2843 (1990); and *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 ¶ 6 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988), where the Commission indicated that an applicant may not certify its financial qualifications and then obtain financing. Given the above, the Board correctly held that Ajax could not rely on a modified financial proposal to meet the financial issue specified against it, in the absence of a showing that it had reasonable assurance of necessary financing at the time it filed its application. *See Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 ¶¶ 3-6 (1990) (applicant was not financially qualified where it failed to demonstrate reasonable assurance of a loan commitment from a bank at the time the application was

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[6] One exception to this requirement is set forth in 47 C.F.R. §73.3522(b)(2), which allows in comparative broadcast cases amendments relating to issues first raised in the hearing designation order (HDO) to be filed as a matter of right within 30 days of the HDO. For the reasons set forth above, we believe that this exception, which is limited by the terms of the specific regulatory provision to a brief period of time immediately following the start of the proceeding, should not be extended to later portions of the proceeding where the risk of disruption and delay in the institution of new service is much greater.

filed), and *Opal Chadwell*, 4 FCC Rcd 1215, 1217 ¶ 20 (1989) (validity of applicant's original financial proposal must be established before it could rely on a new financial proposal).

14. Finally, the Board in its decision refused to consider Ajax's exceptions to the *Initial Decision* which alleged prejudgment and bias by the ALJ. 5 FCC Rcd 3196 ¶¶ 2-4. The Board held that it was not the appropriate forum to consider these matters since the Commission had reserved to itself jurisdiction over such questions, [7] and that Ajax should have proceeded under 47 C.F.R. §1.245, which specifically provides procedures for the removal of an ALJ on the basis of bias and prejudice. In view of the holding herein that the record provides ample basis for denial of Ajax's application under the financial qualification issue, its contentions that other aspects of the ALJ's findings concerning its application are based on bias and prejudice are moot, and thus no further consideration is required of the question of whether the Board erred in refusing to consider pages 5-12 of Ajax's exceptions. *See* n.3, *supra*.

15. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115, the Application for Review filed June 25, 1990, by Ajax Mountain Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

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[7] The Commission recently amended its rules delegating authority to the Board to act on appeals of questions concerning an ALJ's bias and prejudice under 47 C.F.R. § 1.245. 5 FCC Rcd 5366 (1990). However, that rule amendment was promulgated after the Board decided this case.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
FRIENDS UNIVERSITY	)	
and	)	File No. BALED-910729HK
NEW LIFE FELLOWSHIP,	)	
INC.	)	
	)	
For Assignment of License of	)	
Station KSOF(FM),	)	
Wichita, Kansas	)	

To: The Hon. Roy J. Stewart
Chief, Mass Media Bureau
and
The Commission

INQUIRY CONCERNING STATUS
OF PETITION FOR RECONSIDERATION

On May 1, 1992, Friends of KSOF timely filed a petition for reconsideration of staff action by delegated authority granting an assignment application without hearing over its objection. 47 U.S.C. §405(a) requires that such a petition for reconsideration be acted on within ninety days. No action has been taken in some twenty months. This is to inquire as to the status of the matter and to advise the Commission that, if action is not taken by January 31, 1994, Friends of KSOF will petition the Court of Appeals for issuance of a writ of mandamus.

Respectfully submitted,

Gene A. Bechtel

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Counsel for Friends of KSOF

December 29, 1993

U.S. CONST., ART. I, §9, CL. 3

No bill of attainder or ex post facto law shall be passed.

U.S. CONST., ART. I, §10, CL. 1

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

29 U.S.C. §160(e)

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

47 U.S.C. §309(a)

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. §402(b)

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

47 U.S.C. §405

After an order, decision, report, or action has been made or taken in any proceeding by the Commission...any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report or action...The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission...has been afforded no opportunity to pass.